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SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, APRIL 21, 1876. { Hon. JOHN F. DILLON Contributing Editor.

BANKRUPTCY—NUMBER AND VALUE OF CREDITORS—WHETHER ATTACHING CREDITORS SHOULD BE COUNTED.—Elsewhere we print a well-considered, and, to our mind, satisfactory opinion of Mr. District Judge Foster, of the United States District Court for the District of Kansas, in the case of Scafford, in which he determined a question which has been several times mooted in these columns (*ante*, 86, 181), namely, whether in estimating the number and value of creditors on an issue of bankruptcy or no bankruptcy, attaching creditors are to be counted. It will be seen that the learned judge decides the rule in accordance with what we supposed it must be, namely, that since the debts of attaching creditors are *provable* under the act, such creditors are to be counted.

DOM PEDRO II., Emperor of the Brazils, has reached our shores on a centennial visit to this country, and as preparations, to pay him attentions are being made by the civic authorities and the mercantile branches of the community, we suggest that it would not be out of place to have a committee of the bar appointed to introduce him to the courts. The emperor is a wise and progressive ruler, and has, doubtless, among other aims of his visit, to post himself in the working of our various departments of government and business. He will no doubt be glad to have pointed out to him the machinery of our legal systems, and may find in them some features worthy of introduction in his own well-governed empire. A nation's system of law and the operation of its courts form a large element in its greatness; and whether or not the emperor would derive any benefit from what he might see or hear in ours, it would, at all events, be a becoming and not inappropriate courtesy.

HON. WILLIAM B. CALDWELL, recently died at his residence in Cincinnati, Ohio, at the age of 68 years. He was a native of Butler county, and educated at Miami University. He filled successively the offices of prosecuting attorney, presiding judge of the Court of Common Pleas in Hamilton county, and was elected supreme judge by the legislature in 1849. The office was vacated by the new constitution of 1851, when he was elected by the people, drew the short term of one year, was re-elected and held the office till 1854, when he resigned on account of the smallness of the salary, since which time he has been engaged in the practice of his profession in Cincinnati. The decisions of Judge Caldwell, in banc, are found in the 18th, 19th and 20th of Ohio, and the 1st, 2nd and 3rd of Ohio State Reports; are brief, clear, marked by a strong sympathy for right, and ample knowledge of precedents and principles. He stood high among his associates, and particularly among the younger members of the profession, whom he treated with great sympathy and consideration. Though often solicited, he always refused to accept any political office.

DIVORCE IN CANADA.—The proceedings which have grown out of a case of *crim. con.* in Canada, show that the victim of connubial treachery has rather a hard road to travel in the Dominion, and presents an extraordinary difference of opinion entertained by different courts concerning the same facts, though brought out in different proceedings. About three years ago, Robert Campbell, a wealthy merchant of Whitby, Ontario, brought an action in the court of Queen's Bench for the seduction of his wife, against a young man named Gordon, of the same town. The evidence of Mr. Campbell's brother and another man, both of whom had been set to watch the house by the plaintiff on an evening when the husband was away from home, was overwhelming and uncontradicted. They swore to having witnessed repeated acts of adultery between Campbell's wife and Gordon, and to Gordon's admission when confronted by them, after leaving the house about midnight. The trial resulted in an immediate verdict for the plaintiff for $5,000 damages, which was afterwards reduced by a higher court to $1,500, Gordon, in the meantime, having left the country. A few months later Mr. Campbell brought an action of slander in the Common Pleas against James Campbell (who had been selected to play the part of detective on the account of the incompetency of the husband as a witness in an action of adultery). Singularly enough, though perhaps more on account of the ability of her counsel, than the merits of her case, Mrs. Campbell obtained from a sympathizing jury a verdict of $1,000, which verdict was, on appeal, set aside and a new trial ordered. Shortly after, Mrs. Campbell brought a suit in chancery for alimony against her husband, who defended himself on the ground of her adultery with Gordon. This action was dismissed, the chancellor on hearing, and the full court on appeal, finding Mrs. Campbell guilty. On this state of facts, Mr. Campbell petitioned Parliament (which is the only tribunal for the hearing of such cases, there being no divorce court in Canada), for a divorce. The Senate, from whose decision there is no appeal, referred the petition to a committee, which has just rejected it, on the ground that the preamble is not proven.

The Winslow Extradition Case.

Though perhaps wanting in practical interest to the profession, an examination of the point made by the English judge, who declines to deliver the Boston forger to the Massachusetts authorities for trial, in the face of a direct treaty stipulation, may be considered as not inappropriate, and, at least, as a pleasant diversion from the strict and confined channel in which the legal thought usually and necessarily flows. The *London Times* dispatch of the 5th inst. (that journal being the mouthpiece of English opinion) contained the apparently authoritative announcement, that Winslow would not be delivered except upon the assurance that his trial in Massachusetts should be confined to the charge of forgery, to answer which he was demanded, and that without this assurance he would be turned loose at the expiration of two months from the date of his committal. The point is wholly untenable; and while it could hardly be said that the demand evinces an oversight of antecedent history by so able a journal as the *Times*, or a want of knowledge on the part of the courts, it would seem to indicate a desire, or, indeed, a determination on the part of England to force us into a new extradition treaty, or to the acceptance of an *ex-parte* amendment to the existing one. The treaty of 1842 between the two governments, providing for the reciprocal delivery of criminals, will be remembered as the work of two of the best representative statesmen of that day,—Daniel Webster, our secretary of state, and Lord Ashburton, special envoy with plenipotentiary powers to settle certain matters of dispute, chiefly the Northwestern Boundary question. So able, dignified and courteous a deliberation on great international affairs, so able an exposition of international law, and so complete and satisfactory a settlement of mutual rights, as resulted from it, are rare in the annals of statesmanship. The treaty then formed, though not originally contemplating this, established the right of extradition, was promptly ratified by the United

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States government, and by the British government (6 and 7 of Victoria) in the following year; but it did not contain any provision limiting the trial of fleeing culprits to the extradited charges. The provision was general and without qualification. In 1870, however, an act of parliament was passed, with this limitation, looking with no uncertain aspect to the protection of her criminals. Whatever the motive or reason of such an act should have been, it is very certain that it could have no effect on our government, nor could it be considered as repealing the treaty of 1842, as no "Order in Council," was made by the Queen, which is essential to effect such a result. The repealing section of the act excepts what is contained in it inconsistent with the treaties referred to, one of which is the ratifying act of 1843. A case arose in 1872, in which the effect of the act of 1870 on the act of 1843 was passed upon by the English Queen's Bench in a French case, the same treaty existing with France. One Bonvier was claimed by the latter government on a charge of fraudulent bankruptcy and forgery. On *habeas corpus*, Attorney-General Coleridge, in discussing the act of 1870, stated that the clause restricting the trial to the extradited offence, was inconsistent with, and did not apply to, the treaty of 1872. This view was accepted by Cockburn, C. J., and by Justices Blackburn and Mellor, each, however, saying that further legislation on the subject was desirable. But if this authoritative decision would render the present demand unfounded, it would still further appear that it is impossible, from a consideration of the complex character of our government. Winslow is a citizen of the state of Massachusetts, and, having violated its laws by the commission of the crime of forgery, has fled to England. He is guilty of the additional offence of embezzlement, really or supposably; but the demand for extradition is only for the first-named offence. He has been indicted for the offence, and the state requires of the general government, under an authority which it has delegated, to demand him from the English government. Now, it will be seen at a glance, that the assurance asked for by that government cannot be given by either the state or the general government. The state as a sovereignty, is unknown to the English government, and can only act through its delegated agent, the general government. Neither can the latter give the assurance, for its function is simply to act for the state as required, and when Winslow is delivered to the state authorities, her jurisdiction over him becomes paramount. She can try him for any crime he has committed, nor can the general government even make any dictation to her in the matter. Our cousins over the water seem to have lost sight of the fact that a law which may properly exist there, from the unity of their form of government, cannot possibly exist here, owing to the complexity of ours; that while they have, in a matter like this, a supreme jurisdiction as a government, we have a number of sovereignties, each having within itself a supreme jurisdiction, but which can only deal with her through their federal head. In view of the action of her own courts, and the impossibility of obtaining a compliance with her demand, it is probable that she will recede from it. If the point, however, is insisted on, if Winslow is turned loose in the face of our demand, it will be simply the violation of a solemn treaty on an unfounded pretext—a treaty, too, which, however it may be modified or amended by them, cannot be changed by us to conform to their view. As far as we are concerned, the treaty of 1842 must stand as its great authors framed it. The unasked solicitude of the English government for the recusant Winslow must go for naught, and that individual must take his chances before a Boston jury on the charge of forgery, or any other charge the commonwealth of Massachusetts, in the exercise of its criminal jurisdiction, sees proper to press against him. The state of New York has sent for Grey, guilty of gigantic forgeries in her jurisdiction, and, if England is serious, the same delay may grow out of his case. We shall await with much interest the termination of these cases, and will lay the result before our readers.

Foreclosure of Mortgage not affected by Bankruptcy of Mortgagor pending such Foreclosure.

EYSTER v. GAFF.

Supreme Court of the United States, No. 134, October Term, 1875.

Pending proceedings in District Court of Arrapahoe County, Territory of Colorado, to foreclose a mortgage, mortgagor was adjudged a bankrupt, and his assigneee appointed. Tenant of mortgagor defended suit in ejectment on the ground of the invalidity of the foreclosure proceedings after the adjudication of bankruptcy and appointment of assignee. *Held*. 1. That the jurisdiction of the district court, having once attached, could not be ousted by the transfer of defendant's interest. 2. When suit for foreclosure ended by a final decree, transferring the title, that title related back to the date of the instrument on which the suit was based. 3. The same principles apply to trustees made by a bankruptcy proceeding. 4. The jurisdiction conferred upon the Circuit and District Courts of the United States, for the benefit of the assignee, is concurrent with and does not divest that of the state courts.

In error to the Supreme Court of the Territory of Colorado.

Mr. Justice MILLER delivered the opinion of the Court.

This suit was an action of ejectment brought originally by Thomas and James Gaff against plaintiff in error in the District Court of Arrapahoe County, Colorado, in which the plaintiffs below had a recovery, and that judgment was affirmed on appeal by the supreme court of that territory.

The title to certain lots in Denver city is the subject of controversy, and there seems to be no difficulty in considering George W. McClure as the source of title, common to plaintiffs and defendant. McClure had made a mortgage on the lots to defendants in error to secure payment of the sum of $18,000.

A suit to foreclose this mortgage was instituted in the district court in 1868, which proceeded to a decree and sale, and plaintiffs became the purchasers, receiving the master's deed, which was duly confirmed by the court.

This decree was rendered July 1, 1870. On the 9th day of May preceding, the mortgagor, McClure, filed a petition in bankruptcy, and on the 11th day of May he was adjudged a bankrupt, and on the 4th day of June John Mechling was duly appointed assignee. The bankrupt filed schedules in which these lots and the mortgage of the Gaffs on them were set out. It will thus be seen that pending the foreclosure proceedings which had been instituted against McClure, he had been declared a bankrupt and Mechling had been appointed his assignee, and that the decree of sale and foreclosure under which plaintiffs asserted title in the present suit was rendered about a month after the appointment of the assignee, and nearly two months after the adjudication that McClure was a bankrupt. The defendant in the ejectment suit was a tenant under McClure, and defends his possession on the ground of the invalidity of the foreclosure proceedings after the adjudication of bankrutcy and the appointment of the assignee.

The plaintiffs in this suit seem to have relied at first upon the right to recover under the mortgage, and did not give in evidence the proceedings in foreclosure; but when the defendant had read them, so far as the decree and sale, in order to show that the mortgage was merged, the plaintiffs then produced the master's deed. The Supreme Court of Colorado held that the mortgage alone was sufficient to sustain the action, one of the judges dissenting; and counsel for defendant below insists here that this was error, because the laws of Colorado give to a mortgage only the effect of an equitable lien, and not that of conveying a legal title. He also insists that all the proceedings in the foreclosure suit after the appointment of the assignee in bankruptcy are absolutely void, because he was not made a defendant.

We will consider this latter proposition first, for if the forclosure proceedings conveyed a valid title to plaintiffs the judgment must be affirmed, whatever may be the true solution of the question of local law.

It may be conceded for the purpose of the present case that the strict legal title to the land did not pass by the mortgage, and that it did pass to the assignee upon his appointment, and consequently, if that title was not divested by the foreclsure proceedings it was in the assignee at the trial of the ejectment suit. On the other hand, if these proceedings did transfer the legal title to plaintiffs, they were entitled to recover as they did in that action.

At the time that suit was commenced the mortgagor, McClure, was vested with the title and was the proper and necessary defendant. Whether any other persons were proper defendants does not appear, nor is it material to enquire. But for the bankruptcy of McClure there can be no doubt that the sale under the forclosure decree and the deed of the master would have vested the title in the purchaser, and that this would have related back to the date of the mortgage. Nor can there be any question that, the suit having been commenced against McClure when the title or equity of redemption (no difference which it is) was in him, any person who bought of him or took his title or any interest he had pending the suit would have been bound by the proceedings and their rights foreclosed by the decree and sale. These are elementary principles. Is there anything in the bankrupt law, or in the nature of

proceedings in bankruptcy, which takes the interest in the mortgaged property acquired by the assignee out of this rule?

There is certainly no express provision to that effect. It is maintained by counsel that, because the assignee is vested by the assignment under the statute with the legal title, there remains nothing from that time for the decree of foreclosure to operate on, and it can not thereafter have the effect of transferring the title which is in a party not before the court. But if this be true in this case it must be equally true in other suits in which the title is transfered *pendente lite*.

We have already said, and no authority is necessary to sustain the proposition, that a sale and conveyance by the mortgagor pending the suit would not prevent the court from proceeding with the case without the purchaser, nor affect the title of him who bought under the decree. So in a suit against the vendor of real estate for specific performance, his conveyance of the legal title after suit was brought would not suspend the proceeding or defeat the title under the decree of the court. The obvious reason for this is, that if, when the jurisdiction of the court has once attached, it could be ousted by the transfer of the defendant's interest, there would be no end to the litigation, and justice would be defeated by the number of these transfers. Another reason is that when such a suit is ended by a final decree transferring the title, that title relates back to the date of the instrument on which the suit is based or to the commencement of the suit, and the court will not permit its judgment or decree to be rendered nugatory by intermediate conveyances.

We see no reason why the same principle should not apply to the transfer made by a bankruptcy proceeding. The bankrupt act expressly provides that the assignee may prosecute or defend all suits in which the bankrupt was a party at the time he was adjudged a bankrupt. If there was any reason for interposing, the assignee could have had himself substituted for the bankrupt, or made a defendant on petition. If he chose to let the suit proceed without such defence, he stands as any other person would on whom the title had fallen since the suit was commenced.

It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition.

The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to adminster full justice, and was proceeding, according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending.

It was the *duty* of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. It is almost certain that if at any stage of the proceeding, before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right he had or set up any defence to the suit. The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion to be made a party or to take part in the case, deserved no attention, and received none. In the absence of any appearance by the assignee, the validity of the decree can only be impeached on the principle that the adjudication of bankruptcy divested the other court of all jurisdiction whatever in the foreclosure suit. The opinion seems to have been quite prevalent in many quarters at one time, that the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act, not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction; and that other courts can proceed no further in suits of which they had at that time full cognizance. And it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view.

The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary.

The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the state courts.

These propositions are supported by the following cases decided in this court: Smith v. Mason, 14 Wall. 419; Marshall v. Knox, 16 Wall. 551; Mays v. Fritton, 20 Wall. 414; Doe v. Childress, 21 Wall. 642. See, also, Bishop v. Johnson, Woolworth, 324.

They dispose of this case, the judgment in which is affirmed.

NOTE.—This decision overrules many published cases, among them the following: Lee, assignee, v. German Savings Institution, 3 N. B. R. R. 218; *In re* Iron Mountain Company of Lake Champlain, 4 Id. 646; *In re* Brinkman, 7 Id. 421; Phelps v. Sellick, 8 Id. 390; Whitman, assignee, v. Butler, Id. 487. But the decisions have not been uniform. See Augustine v. McFarland, 13 N. B. R. R. 7; *In re* Bowie, 1 Id. 628; Scott v. Kelley, 12 Id. 96. And the state courts have assumed jurisdiction in causes to foreclose mortgage even when instituted *after* commencement of proceedings in bankruptcy. Brown v. Gibbons, 13 N. B. R. R. 407, s. c. 37 Iowa, 661; McKay v. Funk (Sup. Ct. Iowa) 13 N. B. R. R. 334: Reed, Admr. v. Burlington, 49 Miss. 223; McGrady v. Harris, Mo. s. c., 1 CENT. L. J. 34.

The district courts in bankruptcy have, in many cases, denied concurrent jurisdiction in the state courts over causes "growing out of disputed rights of property or of contracts," pertaining to bankrupt estates. *In re* Cent. Bnk. Brooklyn, 7 C. L. N. 371; Walker, assignee, v. Seigel *et al.*, 2 CENT. L. J. 508. Some of the state courts have entertained and some have refused to entertain such suits at the instance of assignees for recovering assets of the bankrupt. The closing paragraphs of the principal case will set at rest this question of jurisdiction. Though not necessary for the determination of the cause directly involved, the United States courts will regard the hint thus made to them, and the state courts will, undoubtedly, revise their decisions in conformity therewith. We refer to the following: "The *debtor* (*sic*- should it not be 'creditor'?) of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. "The *same courts* remain open to him in such contest, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is *concurrent with, and does not divest, that of the state courts.*"

E. T. A.

Instructions—Evidence—Alteration of Note after Endorsement.

IRON MOUNTAIN BANK v. ARMSTRONG *ET AL.*

Supreme Court of Missouri, January Term, 1876.

Present Hon. DAVID WAGNER,
" W. B. NAPTON,
" T. A. SHERWOOD,
" WARWICK HOUGH, } Judges.

1. Instructions.—Instructions must be based on the issues which are presented by the pleadings. They must not be too narrow; as where certain facts are singled out, and a verdict directed regardless of other facts at issue.

2. ——. Falsus in Uno, Falsus in Omnibus.—It is erroneous to instruct a jury that if they believe from the evidence that any witness has sworn falsely in regard to any material fact, they are at liberty to disregard his whole testimony, as it is only where a witness has knowingly testified to an untruth that such a right exists. In the opinion of the court, such an instruction should not be given in the ordinary routine of jury trials, unless there be some ground, other than a conflict of testimony.

3. Evidence.—That the defendant endorsed four other promissory notes containing an interest clause, is not admissible as evidence that the note in suit contained such a clause when endorsed.

4. Alteration of Note after Endorsement.—The liability of an endorser on a note altered after endorsement depends on the state of the note when purchased by the holder. If a blank has been so negligently filled as to easily allow an addition or alteration without any means of detection by a prudent person, the endorser is liable.

5. ——. Negligence—Question of Fact.—Negligence in the filling up of the note, or in the taking by the holder is a question for the jury.

Appeal from Saint Louis Circuit Court

SHERWOOD, J., delivered the opinion of the court.

Suit on a negotiable promissory note which defendant, Armstrong, is charged with having endorsed. The petition contains the usual allegations as to presentment, dishonor and notice.

Though admitting the genuineness of his endorsement the defendant claimed in his answer, which was duly verified, that the words "with interest at 10 per cent. after maturity" were, subsequently to his endorsement, and when the instrument was completed, inserted without his knowledge, consent or authority. The answer also contained the statutory general denial, as to dishonor, notice, etc. The reply was similar in its essential features to the one in the Capital Bank against the same defendant, decided at the present term, the only difference being that the reply here was more emphatic in its denial of the alteration, alleging "that said new matter was untrue, and a mere pretext on the part of the defendant," etc.

The note sued on was in this form:

$5,000. ST. LOUIS, August 6, 1873.

Sixty days after date we promise to pay to the order of David H. Armstrong five thousand dollars, at Third National Bank, St. Louis, Mo. Value received with interest at 10 per cent. after maturity.

MURDOCH & DICKSON.

No. ——.
Due ——.

The evidence was to a certain extent conflicting. The plaintiff had a verdict and judgment. On appeal to general term there was a reversal, on account of which the plaintiff has appealed.

1. In conformity with our previous ruling in the case above referred to, inasmuch as there was no issue made by the pleadings as to subsequent ratification by Armstrong, of the alleged alteration, the third instruction given at plaintiff's instance, must be held erroneous. It manifestly diverted the attention of the jury from that which *was* to that which *was not* in issue, thus defeating the very object which the law has in contemplation when requiring pleadings to be filed. And a court does not possess the power to change by instructions the issues which the pleadings present. Moffat v. Conklin, 35 Mo. 453; Camp v. Heelan, 43 Mo. 591.

Our statute (2 Wag. St. page 1040, sec. 11) defines trial as "the judicial examination of the issue between the parties." Now, it is obvious, that a trial must fail in accomplishing its statutory purpose, when diverted to the examination of matters *de non* the record and foreign to the issues.

2. The second instruction on behalf of the plaintiff was to the effect that if the interest clause was inserted, either before or after Armstrong's endorsement, and with his consent, this would warrant a finding in favor of the plaintiff. The serious objection to this instruction is, that while it may be correct as far as it goes, it is altogether too narrow in its scope. The other allegations of the petition, put in the issue by the answer, as to whether the bank was the holder of the note, as to the presentation of the note for payment, as to its dishonor, as to notice to defendant, etc., etc., are entirely ignored and lost sight of. And yet all these were controverted facts; all necessary to be proven in order to a recovery. And this lack in the instruction was not supplied by any others. The instruction therefore was clearly violative of the principle so often asserted by this court, that an instruction is erroneous which singles out certain facts and directs a verdict, if they are found regardless of other facts at issue. Hines v. McKinney, 3 Mo. 382; Regerson v. Pomroy, 13 Mo. 620; Clark v. Hammerle, 27 Mo. 55; Mead v. Brotherton, 30 Mo. 201. Instructions are equally faulty whether enlarging or restricting the issues.

3. The first instruction asked and given for the plaintiffs, that "if the jury believe from the evidence, that any witness has sworn falsely in regard to any material fact in issue, they are at liberty to disregard his entire evidence," should have been given, if given at all, in a different shape than that in which it was asked. It is not true as a legal proposition, that because a witness has honestly testified to that which is in point of fact untrue, that, therefore, the jury may reject the whole of his testimony. It is only where a witness has *knowingly* testified to an untruth, that an instruction of this character should be given. Paulette v. Brown, 40 Mo., 52., and cases cited. The instruction, however, in the case before us, even if properly worded, would appear to have had little, if anything whatever, to base it. It is certain that such an instruction should not be given in the *ordinary routine of jury trials;* and merely because there happens to be a conflict of testimony, such conflict by no means implies dishonesty of motive. The best citizens of the country, when called to the witness-stand, frequently differ in their versions of the same facts; but yet this alone should furnish no basis for impugning their purity of purpose, or denouncing them as wholly unworthy of belief.

4. The fourth instruction asked by defendant should have been given. The simple fact that the defendant was the endorser of four other promissory notes, containing interest clauses, did not tend in the slightest degree to show that he had authorized the insertion of a clause respecting interest in the note in suit. These notes should not have been admitted, or if improvidently admitted should have been excluded, as asked by the instruction referred to. For it is a rudimentary principle "that the evidence must correspond with the allegations and be confined to the point in issue." 1 Greenleaf Evidence, sections 50, 51, 52, 448. Were the rule otherwise, litigation would be interminable, by reason of the introduction of collateral issues. This evidence was received very doubtingly by the trial court; but we think it should have been, for the reasons given, altogether rejected; and it certainly could not be received for the purpose of discrediting Armstrong, who had been interrogated on the subject. A witness can not be questioned as to an impertinent matter, in order to contradict him. Harper v. I. and St. L. Railroad Co., 47 Mo. 567; 1 Greenleaf Evidence, sec. 449.

5. In reference to the note in suit, the evidence tended to show that at the time of its transfer to plaintiff it was in the same condition as now, and there was nothing impeaching the *bona fides* of such transfer. It was shown, however, on the part of the defendant, that after his endorsement was made and the note redelivered to Murdoch, the maker, the interest clause was inserted in the absence and without the authority of Armstrong, by the book-keeper of Murdoch, at the instance of the latter. The clause respecting interest is in the same handwriting as the body of the note, all having been written by the book-keeper, who testified that after the note had been signed by Murdoch & Dickson and endorsed by Armstrong, witness wrote the words mentioned in an oblique direction in order to avoid writing over the "D" in the name of Dickson. The original note is before us, and although there was some variance of opinion as to whether the words in question were written with different ink, we have been able to discover, in regard to any difference in the color of the ink employed, nothing which would readily excite observation. This note does not present a glaring case of alteration like that in the case of the Capital Bank, *supra;* for there the alteration was in ink of a different color; was, in short, an *interlineation* patent to even casual observation. If the note, although complete at the time it left Armstrong's hands, had been so loosely filled, in respect of the principal sum mentioned therein, as to easily admit of enlarging the liability already imposed by the instrument, and in a manner calculated to baffle prudence in its ordinary manifestations, no hesitancy would be felt in asserting, in accordance with our more recent adjudications, the undoubted liability of the endorser to an innocent purchaser. And the same line of remark, we regard applicable in the present instance. If the instrument was really complete, but was so carelessly printed, as to give an apparent authority to fill a blank space, occupying the same relative position to the body of the note that an interest clause usually does, we strongly incline to the opinion that if this space furnished ample room, and was not filled in a way to attract observation, that the endorser would be bound to an innocent holder. And in either of the cases instanced the matter is for the jury, under proper instructions. The blank being considered is unquestionably *not* an ordinary interest blank, which is usually printed thus "with interest from ——— at ——— per cent. per annum." If there were such a blank here, it would carry on its face, as concerns an innocent purchaser conclusive authority for filling the spaces thus left, regardless of the fact whether such spaces were filled with the adroitness incident to practised penmanship or otherwise, and hence no difficulty would be experienced in the proper disposition to be made of the point. If the space left had in lieu of the words it now contains been filled with these, "And one hundred dollars additional after maturity," no one would doubt that the purchase of such an instrument could not be sanctioned without at once breaking down all existing barriers between negligence on the one hand and prudence on the other. But there would seem to exist a certain degree of appositeness in the insertion of the words in the usual place allotted to them, of the same import constituting the alleged alterations, when no decree of appropriateness could be affirmed of words of the tenor and effect used above, by way of illustrating an extreme case. And the reason for distinguishing the *real* from the *hypothetical* case, must be obvious. In the latter, the insertion in an unusual place, of unaccumstomed words, should give the alarm to prudence, and put caution on the alert. But in the former case it would scarcely seem probable that apprehension should be awakened by words which accompany as a usual incident, those which compose the body of the instrument, if such words are apparently inserted contemporaneously with the residue of the other written words of the note, and not in a manner provocative of an enquiry.

These considerations induce the belief before expressed that the matter of the alteration of the note, and as to whether, if altered, it was done in such a manner as to challenge investigation, when purchased by the bank, can be appropriately committed to the triers of the facts, with proper instructions. The same may be said respecting the question of ratification, in relation to which we refer to our recent decisions of Evens v. Foreman, decided at our last term at St. Joseph, and German Bank v. Dunn, decided at the present term, and also to the following authorities, enunciating the same doctrine 2 Greenleaf Evidence, section 66; Story on Agency; (8 Ed.) sections 239, 445 and notes; Paley on Agency, (By Dunlap) 171, and cases cited; 1 Parsons on Contracts, 101.

For the reasons heretofore given, the judgment of general term reversing that of special term is affirmed.

Judge Vories absent; the other judges concur.

Bankrupt Act—Number and Value of Creditors—Attaching Creditors.

IN RE SCRAFFORD.

United States District Court, District of Kansas, April 1876.

Before Hon. G. C. FOSTER, District Judge.

1. Attaching Creditor may Intervene and oppose an adjudication in bankruptcy, and may show that the requisite number and amount of creditors have not joined in the proceedings.

2. Number and Value of Creditors—Attaching Creditors to be Counted.—In determining whether the required number and amount of creditors have joined, creditors who have obtained attachments on the respondent's property should not be excluded on that account.

Judson & Motter, for petitioning creditor; *A. Well, J. E. Taylor & John Doniphan,* in opposition.

FOSTER, J.—Isaac T. Hosea filed his petition in bankruptcy against C. G. Scrafford. On the return day of the order to show cause, the respondent, being absent from the state, his attorney appeared for him and filed a denial in writing that the petitioning creditor constituted one-fourth in number of the creditors and whose debts aggregate one-third in amount of the debts provable under the bankruptcy act, and also filed a list of creditors and the amounts due each; which denial and list was sworn to by the attorney of the respondent. The petitioning creditor moved to strike out the said denial and list of creditors, because the same are not verified by the oath of the respondent. Pending said motion, certain other creditors of the respondent who hold attachments on the property of respondent on proceedings pending in the state court, asked leave to intervene in opposition to said petition, and alleging that the requisite number and amount of creditors had not joined in the bankruptcy proceedings. These questions have been argued together, and so far as this case is concerned, if either the debtor or the attaching creditors are in a position to contest the question as to the number and amount of creditors, it matters but little under which party the enquiry is made.

There is no doubt but attaching creditors have such an interest in the proceedings that they may intervene and oppose the adjudication, and they may contest the question as to the number and amount of creditors, as well as any other material fact in the case. *In re* Boston, Hartford & Erie R. R. Co., 6 N. B. R. 209; *In re* Berguon, 12 N. B. R. 385; *In re* Mendelsohn, Id. 533; *In re* Hatje, Id. 548; *In re* Jack, 13 N. B. R. 299.

The law evidently intends that the court shall be satisfied that the proper quorum of creditors have united in the proceedings. Even the written admission of the respondent on this point is not conclusive, but the court must be satisfied it is made in good faith, and without collusion.

Supposing the respondent made no appearance on the return day, or he should make out a list omitting certain creditors, in either case a collusive judgment might be obtained, as well as by the written admission of the debtor.

The law provides, if the respondent shall deny that the necessary quorum of creditors have joined, he shall then be required to file a list of the creditors; "and the court shall ascertain upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount as aforesaid have petitioned * * *." This provision of the law brings before the court other creditors having provable claims, and they may then be heard on the enquiry, although there is no charge of collusion or fraud.

In this case, I think the application of the attaching creditors to intervene should be allowed, and that is sufficient to throw the duty on the court of making the investigation, and it is not necessary to determine whether an attorney may verify the denial and list of creditors, or whether any verification at all is necessary.

The petitioning creditor asks to have excluded from the number such creditors as have secured a hire on the debtor's property by attachment proceedings. This is a very material point in this case, as it is probably decisive of the question under investigation. If the attaching creditors are excluded from the list, it would seem that the requisite number and amount have signed the petition. If they are not excluded then the reverse is true. The discussion that has been had of this question, and the investigation and thought I have given it, have convinced me that it is not as easily answered as at first blush might appear.

From the best comprehension I have been able to give the subject, it is my opinion the attaching creditors should not be excluded in computing the number and amount. The law says: "Shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof at least in number, and the aggregate of whose debts *provable under this act* amounts to at least one-third of the debts so provable." The question, then, primarily is simply this: What debts are provable under this act?

It has been repeatedly decided that a secured creditor, or one holding a lien within the meaning of section 5075, is not a creditor holding a *provable debt*. The doctrine is concisely stated by Judge Blodgett, in *In re* Frost, 11 N. B. R. 73. He says: "It therefore seems evident to me that by the term debts *provable under this act*, Congress meant debts unconditionally provable without any release or other preliminary action, either by the court or assignee, being necessary." Section 5084 prohibits a creditor, who has received a preference, from proving his debt until he shall have surrendered the property, money, or benefit so received. Under the act of June, 1874, in case of actual fraud, he can then only prove a moiety of his debt. Section 5021 also prohibits the preferred creditor from proving his debt.

There, then, are two classes of creditors whose debts are not *provable under this act*, within the technical meaning of these words: The *secured creditor*, and the *preferred creditor*. It is contended that a creditor who has obtained a lien by attachment proceedings, comes within the provision of sec. 5075; that he has a lien for securing the payment of his debt.

By the provisions of sec. 5044, all attachments obtained on the debtor's property within four months next preceding the commencement of the bankruptcy proceeding, are dissolved by the transfer to the assignee. Now it seems apparent that the mortgage, pledge or lien mentioned in section 5075 refers to a mortgage, pledge, or lien, not only *in esse*, but one that continues to exist, notwithstanding the bankruptcy, a lien that is vested and absolute. It makes provision for ascertaining the value of the security and applying it to the payment of the debt after the adjudication, and the election of an assignee. It provides that the holder of the security shall be admitted as a creditor, only for the balance of the debt after deducting the value of the property, to be ascertained by agreement between the assignee and the creditor, or by a sale under the order of the court. Thus the holder of the security may be admitted as a creditor, or he may not be; depending on the value of the security, to be determined thereafter in the manner provided by the law.

It is urged that the same reason which would prevent a preferred creditor from proving his debt, applies with equal force to an attaching creditor. Supposing that to be true, the answer is that the preferred creditor is excluded by the explicit provision of the law, while the attaching creditor is not.

Again, supposing sec. 5084, or the prohibitory clause of sec. 5021 was not in existence; is there anything in the law to prevent a preferred creditor from proving his debt? If there is, why the necessity of a special provision for the exclusion of such creditors? It shows that the legislative mind did not understand that sec. 5075 prevented the preferred creditor proving his debt, and they therefore made provision in express terms for such cases.

As to whether an attaching creditor has a *provable debt*, let us draw a deduction from the decided cases before referred to, 12 N. B. R. 385, 533 and 548. It is there held, as we hold here, that attaching creditors may intervene and oppose an adjudication in bankruptcy. Now if an attaching creditor has not a *provable debt*, then the courts have in those cases established a precedent that a creditor who has not a *provable debt*, a secured creditor, if you please, may intervene and control the proceedings in bankruptcy, and defeat the adjudication. I think no case can be found where the court has permitted secured creditors to interfere with the proceedings for an adjudication. *In re* Frost, speaking of this matter, the court says, "Any other construction would make it practically impossible to put a very large proportion of debtors into bankruptcy, as it would leave unsecured creditors entirely at the mercy of those who had by diligence or otherwise obtained security." *In re* Green Pond R. R. Co., 13 N. B. R. 121; *In re* Hatje, the claim of the attaching creditor was counted in the list without objection. The court says: "Treating the demands in favor of the attaching creditors and of H. P. Hatje as subsisting *provable debts*, it resulted that the requisite amount of debts was not represented by the petitioning creditors." In that case it seems to have been material to determine whether or not the attaching creditors' claims should be included, and yet the petitioning creditors permitted it to be done without objection, so far as appears from the opinion of the court.

It is argued, and with much reason, that if attaching creditors are included, that other creditors are very much at their mercy. The fact is, that under any circumstances, any one or more creditors less than one-fourth in number, and one-third in amount, is and are very much at the mercy of the other creditors, whether they have, or have not attached. It is true that a creditor who has seized sufficient property by attachment to secure his debt is less likely to join in bankruptcy proceedings, than he otherwise would. On the other hand, he labors under some disadvantage. If he attaches, his labor and expense may be all for naught, by reason of subsequent bankruptcy proceedings; and if he does not attach, the debtor may squander his property and the creditor lose his debt *in toto*. In most cases, a creditor is not sufficiently conversant with the debtor's affairs to know the names and evidences of any considerable number of the creditors, and so it is often no easy task to get bankruptcy proceedings started, and then the moving creditors take the chances of getting the requisite number and amount of creditors to join, or of having the costs to pay on a dismissal of the petition.

The hardship of the law, however, in particular cases, is not a reason for interpretating its meaning different from its apparent intent and purpose.

The Missouri Stock Law Unconstitutional—Delegation of the Law-making Power—Legislation by the People.

LAMMERT v. LIDWELL.

Supreme Court of the State of Missouri, January Term, 1876.

Hon. DAVID WAGNER,
" WM. B. NAPTON,
" H. M. VORIES,
" T. A. SHERWOOD,
" WARWICK HOUGH, } Judges.

An act of the legislature of Missouri, approved March 20, 1873, provided that the county court of any county may submit to the voters of the county the question of restraining domestic animals, and, that if a majority of the votes is in favor of restraint, it shall be unlawful in that county for animals to roam at large. The act gives the voters in each county the authority once in each year to determine whether they will enact the law for their county. *Held*, that the act is in contravention of the state constitution, and void.

Argument 1. The power of legislation is vested in the state legislature which must exercise the legislative authority in the enactment of laws, and can not delegate the trust.

Argument 2. The legislature can not propose a law and submit it to the people to pass or reject it by a general vote; that would be legislation by the people, but a law may be passed which is complete in itself, to take effect upon the happening of an event.

Argument 3. The law is entirely special in its nature. The legislature does not even assume that it is necessary, but remits the question wholly to the county to determine whether it shall enact the special law for itself, and thus the law, depending altogether on a vote of the people, is an attempt to exercise the law-making power by a body other than the legislature.

WAGNER, J., delivered the opinion of the court.

This was an action to recover possession of twelve head of cattle, the property of plaintiff, alleged to be wrongfully detained by defendant. The defendant, who acted as one of the constables of St. Louis county, justified the taking and detention of the cattle, under and by virtue of an act of the legislature of this state, approved March 20, 1873, entitled "An act to Prevent Domestic Animals from Running at Large in those Counties which, by a majority vote, may decide to agree thereto" (Sess. Acts, 1874, p. 20), and of an act of the legislature, approved April 1874, entitled "An act to Restrain Domestic Animals from Running at Large in the county of St. Louis, and to provide for the safe keeping of and sale thereof." Sess. Acts, 1874, p. 239. A demurrer was filed to the answer, upon the ground that the matters therein pleaded constituted no defence to the plaintiff's cause of action. The demurrer was overruled, and the plaintiff declining to plead further, the interest of defendant in the property was, in accordance with a stipulation, assessed at $20, and, on motion of defendant, a judgment for that sum was entered in his favor. The only questions presented by the record are, whether the acts referred to are constitutional and valid. The first section of the act of 1873 declares that the county court of any county in this state shall, upon petition of one hundred freeholders of the county, at any general election, and may, upon petition of one hundred freeholders, at any special election, cause to be submitted to the qualified voters of the county the questions of restraining any domestic animals of the species of horse, cattle, mule, ass, swine, sheep or goat, from running at large, by a ballot, to be written or printed, for restraining any one or all of said species, or against restraining the same, to be canvassed and returned in like manner as votes for state and county officers.

Section 2 provides that if a majority of the legal voters of the county, voting at the election, are in favor of adopting a stock law, then such county shall be governed by the provisions of this act from and after

one hundred and fifty days after it has been so adopted by the legal voters of the county.

The third section makes it unlawful, in any county adopting this act, for any animal to run at large outside of the enclosure of the owner, and provides for taking them up, and if they are not reclaimed within a certain time, and the owner does not make reasonable compensation for feeding and taking care of them, they are to be regarded as estrays, and dealt with accordingly.

By the constitution of this state the legislation is vested in the general assembly, composed of the senate and house of representatives. They must exercise the legislative authority in the enactment of laws, and they cannot delegate their trust. The legislature can not propose a law and submit it to the people, to pass or reject it by a general vote, for that would amount to legislation by the people. But a law may be passed which is complete in itself, to take effect in future contingency, or upon the happening of an event.

The question has been before this court upon several occasions, and the line of distinction has been drawn in reference to the different character of such laws. There is a general law upon the statute, in regard to the incorporation of towns, investing the county courts with power to declare them incorporated upon the performance of certain conditions by the embodiments. This law was contested for the reason that it was a delegation of political power, and that the proceedings of the court were legislative in their character. But the statute was decided to be valid, on the ground that the corporation derived all its power from the law, and that the court merely gave the law application when certain conditions were performed by the inhabitants. Kayser v. Bremen, 16 Mo. 88; State v. Weatherby, 45 Mo. 17. So, acts of the legislature authorizing towns, cities and counties to subscribe stock in corporations and incur expenses for different purposes, had been uniformly upheld. (The validity of such laws has never been doubted since the decision in the City and County of St. Louis v. Alexander. 23 Mo. 483. The provision in the statute authorizing cities and towns to organize for school purposes, upon a vote of the people, has been declared constitutional. State v. Wilcox, 45 Mo. 458), and the township organization law was declared not to be liable to any objection, as it was a law which took effect from and after its passage, and where a majority of the voters in a county voted for it; their votes did not create the law, but placed the county voting for it within its provisions. Town Organ. Law, 55 Mo. 295. It may now be conceded as the established doctrine that statutes creating municipal corporations, or imposing liabilities upon municipalities or authorizing municipalities to incur debts and obligations, or to make improvements, may be referred to the popular vote of the districts immediately affected—that is to say, the people of such districts may decide whether they will accept the incorporation or will assume the burdens. This is the prevailing rule in reference to local measures. But in all these cases the legislature had enacted a complete and valid law, according to the prescribed usage governing the passage of laws, and the happening of the contingency of the future event, which furnishes the occasion for the exercise of the power, gives an additional efficacy of the law itself. It derives its whole vigor and vitality from the vote of the people. But no body but the legislature can make or repeal a law. The provision of the road law of 1851, which declared that if the county should be of the opinion that the provisions of the act should not be enforced, they might, in their discretion, suspend the operations of the same for any specified length of time, and thereupon the act should become inoperative in such county, for the period specified in such order; and, thereupon, order the roads to be repaired and kept in good order under the laws heretofore in force, as the special acts on the subject of roads and highways were adjudged to be unconstitutional and void in this court, as attempting to confer upon the county courts legislative power. State v. Fields, 17 Mo. 529. In one of the leading cases on the subject (Barto v. Hinrod, 4 Deld. 483) the legislature of New York framed a school law and submitted it to the people, one section providing that "the elections shall determine by ballot at the annual election, to be held in November next, whether this act shall become a law;" and a further provision was made, in another section, that in case a majority of all the votes cast should be against the law, then the act should be null and void; but if the majority was in favor of the law, then the act should become a law and take effect. It was held that the law was unconstitutional, that the legislature had no power to submit a proposed law to the people, nor had the people power to bind each other by it. The legislature of Delaware passed an act to authorize the citizens of the several counties of the state to decide by ballot whether the license to retail intoxicating liquors should be permitted. By the act a general election was to be held, and if a majority of votes in any county should be cast against licenses, it should not thereafter be lawful for any person to retail intoxicating liquors within such county, but if a majority should be cast in favor of license, then license might be granted in the county so voting, in the manner and under the regulations in the act prescribed. The court in that state held that the act was void, as an attempted delegation of the trust to make laws. Rice v. Foster, 4 Harr. 479. So in Pennsylvania, a license law was held unconstitutional on similar grounds. Parker v. Corn. 6 Penn. St. 50. The question was recently discussed in New Jersey, in a case testing the validity of the "Local Option Laws" of that state, and the law was held to be constitutional, on the ground that municipal corporations and townships, or the people thereof acting collectively, might be vested with authority to regulate or prohibit the retail of intoxicating liquors. State v. Morris, Com. Pl. 12, Law Reg. N. S. 32. But the court placed the decision distinctly upon the fact that the legislature enacted the law, and that it derives all its force and vitality from the enactment. The reasoning of the court was in perfect harmony with all the leading decisions. It was said that if the right to declare what the law shall be in one case may be referred to the people, the right to do so may be given in all cases, and thus the legislature may divest itself wholly of the power lodged in it by the fundamental law, until by subsequent legislation it shall be rescinded. It is also obvious that it is not competent to delegate to the people the right to say whether an existing law shall be separated or its operations suspended, to say that what is now the law shall not hereafter, or shall not for a specified time, be the law, is in effect to declare this law to be otherwise than it now is. There is a clear exercise of the law-making power. The will of a legislature must be expressed in the form of a law by their own act. If it is left to the contingency of a popular vote to pronounce whether it shall take effect, it is not the will of the law-makers, but the voice of their constituents, which molds the rule of action. If the vote be in the affirmative, it is a law; if in the negative, it is not a law. The vote makes or defeats the law, and thus the people are permitted unlawfully to resume a right of which they have divested themselves, and, by a written constitution, to declare by their own direct action what shall be law. After pursuing this course of argument, the court declared, upon an examination of the act under consideration, that the test was whether the enactment, when it passed from the hands of the law-giver, had taken the form of a complete law, and it was decided that it was a complete law. It denounced as a misdemeanor the selling of liquor without a license; so far it was positive and free from any contingency. It left to the popular vote to determine, not whether it should be lawful to sell without license, but whether the contingencies should arise under which license might be granted. Our form of government is a democracy, but it is a representative democracy. It is impracticable for the people to assemble in mass to make laws; hence the power was delegated to representatives chosen for that purpose. It is not only the right of the representatives when assembled in the legislature to make laws, but is their duty to do so. When the people through the constitution delegated the law-making power to the legislature, it conferred an authority and imposed a duty which could not be exercised by any other body of men. Therefore, every law to have any binding validity must, when it emanates from the legislative body, have the form and character of a complete enactment. It must operate by virtue of legislative authority, and not depend upon popular action or the people's suffrage for its vitality. If the law is regularly enacted according to the prescribed forms of legislative procedure, it may well be allowed to depend upon contingencies for its operation upon classes or localities, but it cannot be made to depend for its existence upon any other than the legislative will.

Is the law we are now considering in reference to the restraint of animals a valid law, or is it a mere proposition to the people of eastern counties to make it a law, if they see proper to do so? It is very evident that it can have no existence or obligatory force unless the same be imparted to it by a vote of the people. The title to the act does not purport to be the title of a general law or of a legislative enactment, but it declares that it is an act to prevent domestic animals from running at large in those counties which, by a majority vote, may decide to agree thereto; not an act of the legislature, but an act of the counties which may in reality adopt it. The title is a fair index and exponent of the true intent and meaning of the law. The first section provides that the county court of any county may submit to the voters the question of restraining domestic animals, and then it is declared in the second section that if a majority of the votes in any county is in favor of the restraint, then it shall be unlawful in that county for animals to roam at large, according to the provisions of the third section. The fourth section prohibits the county court from ordering a special election for the adoption of the new law oftener than once in each year. In other words, this last section gives the voters in each county the authority once in each year to determine whether they will enact a law for their special benefit. If they decline, under the provisions of the first and second sections, to legislate on the subject, then the law has no existence. The law is entirely special in its nature, and whilst under the construction that has been given to the clause in the constitution in regard to special legislation, it has been held that the legislature was to judge whether the special law was needed or was applicable, it was at the most, of even this construction, a legislative discretion, and could b eexercised only by the legislature. But here the legislature does not assume that even in its opinion the law is necessary in a given or particular county. It remits the question wholly to the county itself. The second, or amendatory act, is made entirely applicable to St. Louis county, and by the act the people of that county determine for themselves whether they shall enact a special law. It is true the last named act does not provide for a new election, but the law only has any force or existence at all in the county by virtue of the election in the first instance. In examining the whole act I am unable to arrive at any other conclusion than that the law depends altogether on a vote of the people, and that it should be declared void, as being an attempt to exercise the law-making power by a body other than the legislature.

I therefore think the judgment should be reversed.

All the other judges concurring, except Judge Vories, who is absent.

—At a recent meeting of the bar association of this city, a report was made which mentioned the name of a Mr. Griffin, in connection with certain disreputable practices, but omitted the mention of his Christian name. The committee placed the matter before the association in this indefinite shape, and the result was to do serious wrong to one or two attorneys bearing the same surname. As a matter of justice, it is stated that the report had no reference whatever to Mr. Gerald Griffin, but referred to an entirely different party.

Criminal Procedure—Jury Viewing Scene of Homicide.

BENTON v. THE STATE.

Supreme Court of Arkansas, November Term, 1875.

Hon. E. H. English, Chief Justice.
" David Walker, } Associate Justices.
" W. M. Hanison, }

1. Jury viewing scene of Homicide.—Where on a trial for murder the jury were taken to view the premises where the crime was alleged to have been committed, and such visit was made in the absence of the prisoner, it was held error, and a new trial ordered, since a defendant in a criminal trial is entitled to have all the evidence which is brought before the jury, submitted to them in his presence.

2. Challenge.—Though the court may have improperly ruled on the competency of a juror, thereby causing the prisoner to challenge such juror peremptorily, yet as it did not appear that he had, before the jury was empanneled, exhausted his peremptory challenge, it was held no cause for reversal.

3. Taking Instructions to Jury-room.—To allow the jury, on retiring, to take the written instructions of the court into the jury-room, is a matter of discretion with the presiding judge.

4. Instructions.—In a trial for murder the jury were instructed as follows: "The doubt which will justify a verdict of acquittal is not every captious or far-fetched doubt, but must be a reasonable and rational doubt left upon the minds of the jury, after a careful investigation of all the facts proven in the case, and if after such examination of such evidence, they can say *as men*, we verily believe, beyond a reasonable doubt, the defendant guilty as charged, and their hearts and consciences approve such decision, they will be justified in finding a verdict against defendant." *Held*, not erroneous.

Terry & Vaughan, attorneys for defendant.

English, C. J., delivered the opinion of the court.

John Benton was tried on an indictment for murder and found guilty of murder in the first degree; a motion for a new trial was overruled, and he was sentenced to suffer the penalty of death. An appeal was allowed by the chief justice, on account of probable errors appearing in the transcript of the record.

There were nine causes assigned in the motion for a new trial, which were disposed of in their order as set down in the motion. * * *

2. "That the court erred in giving the *second* instruction asked for the state, and against the objection of defendant."

The defendant was charged with the murder of *Bob Stiegall*. The *corpus delicti* was proven, but the state attempted to establish by circumstantial evidence that the defendant committed the crime. The state asked for two instructions—no objection is made to the first. The second was as follows: "The doubt which will justify a verdict of acquittal is not every captious or far-fetched doubt, but must be a reasonable and rational doubt left upon the minds of the jury, after a careful investigation of all the facts proven in the case, and, if after such examination of such evidence, they can say as men, we verily believe, beyond a reasonable doubt, the defendant guilty as charged, and their hearts and consciences approve such decision, they will be justified in finding a verdict of guilty against the defendant." The counsel for appellant have criticised the words "can say as *men*," as used in the above instruction. They urge that this expression was calculated to mislead the jury; to indicate to them that they might form their conclusions as to the guilt or innocence of the prisoner, as *men* and not as *jurors*, acting under oath. The counsel say that as *men* they might be convinced by hearsay evidence, but as *jurors* they could not be, &c. The criticism is not warranted where the expression complained of is considered in its proper connection with what precedes and follows. The first instruction relates to the certainty which the law requires in cases of circumstantial evidence. and is in substance that the law does not demand absolute or mathematical certainty, but if all the circumstances in proof convince the mind, beyond a reasonable doubt, of the defendant's guilt, the jury may so declare. The object of the second instruction was to explain to the jury what was meant by a reasonable doubt. It was not to be captious or far-fetched, but a doubt of prisoner's guilt left on the minds of the jury after a careful investigation of all the facts proven in the case, &c. Supposing them to be men of ordinary intelligence, there was nothing in the instruction calculated to induce them to infer that they were at liberty to disregard their oaths as jurors, or to act as men in the streets, not upon oath, in arriving at a conclusion as to the guilt or innocence of the defendant. See Burrill on Cir. Ev. 198–200.

3. "That the court erred in not allowing the jury, upon motion of the defendant, to take with them to their consultation room the instructions given them on the part of the state and defendant." The court had discretion to refuse or permit the jury to take with them the instructions, on returning to consider of their verdict, as held in James Hurley v. The State Manuscript Opinions. * * * 7. "Because the court erred in deciding that Richard Fletcher was a competent juror," &c. The bill of exceptions states "that during the empanelling of the jury, Richard Fletcher was presented as a juror, and, upon his *voir dire*, stated that he had had a conversation with George Counts, a witness on the part of the prosecution concerning some material facts in regard to one barrel of the gun of the defendant being recently loaded, &c., and had read the report of the coroner's jury, and from these two things had formed an opinion as to the guilt or innocence of the prisoner, and would require evidence to remove that opinion, though he would try to be governed by the evidence, and that he had not now any such opinion in the case as would prevent him from trying the case impartially and without prejudice to the substantial rights of the defendant." Whereupon the court ruled that he was a qualified juror; the defendant excepted, and challenged him peremptorily. When the jury was finally made up, the defendant had used but fourteen (14) of his peremptory challenges, and had still six unused. Neither the bill of exceptions nor the record entry shows whether the prisoner used any peremptory challenges after challenging Fletcher.

The provisions of the criminal code cover the whole subject of challenges. Gantt's Dig. p. 419–20. It may be supposed, though the bill of exceptions does not show it, that the prisoner challenged the jury for actual bias. "Actual bias is the existence of such a state of mind on the part of the juror in regard to the case, or to either party, as satisfies the court, in the exercise of a sound discretion, that he cannot try the case impartially and without prejudice to the substantial rights of the party challenging." Gantt's Dig., sec. 1910. The challenge was tried by the court on examination of the juror under oath, and the court found the juror qualified. Ib. sec. 1917–18. The court, under the statute, sits in the place of triers, which are dispensed with. The statement of the juror, as it appears in the bill of exceptions, is not consistent. He first states that he had formed an opinion as to the guilt or innocence of the prisoner from conversing with a witness and reading the report of the coroner's jury, and that it would require evidence to remove that opinion, though he would try to be governed by the evidence. Had he stopped here, the court should have sustained the challenge, but he stated further, in effect, that he had not, at the time he was examined ("now"), any such opinion in the case as would prevent him from trying the case impartially, and without prejudice to the substantial rights of the defendant. His closing statement would seem to take the juror out of the disqualifying language of the statute. Construing the statute in reference to the bill of rights, which secures to the accused a trial by an impartial jury, we think it would have been safer for the court, upon the whole statement of the juror, to have sustained the challenge; but we cannot undertake to say that the court, sitting in the place of triers, and hearing the whole statement of the juror, who was personally before the court, abused its discretion in overruling the challenge.

But suppose it be conceded that the court did err in overruling the challenge, and the decision of the court is the subject of exception notwithstanding the statute to the contrary (Gantt's Dig. sec. 1978), can the appellant avail himself of such an error, after having elected to get rid of the juror by challenging him peremptorily? In Stewart v. The State, 13 Ark. 742, the prisoner had to exhaust three peremptory challenges to correct jurors of the court, and yet, because the record did not show that he had exhausted all his peremptory challenges before the jury was made up, it was held that he could not avail himself of the errors of the court. In this case the bill of exceptions shows that the prisoner had six (6) peremptory challenges unused when the jury was completed, and thereby renders the probability that he may have been prejudiced by the error of the court less than it was in Stewart's case. Moreover, the bill of exceptions does not make it appear in this case that the prisoner had any occasion to use, or in fact did use, any peremptory challenge after he challenged Fletcher. * * *

9. "Because the visit to and view of the premises by the jury, where the killing was alleged to have occurred, was made by the jury without the presence of the defendant." The following entry was made when the court was about to adjourn over until the next day: "The court being of opinion that it is necessary that the jury should view the place where the offence is charged to have been committed, herein, on motion of the prosecuting attorney, doth order that said jury be conducted in a body, in custody of the proper officer, to the place. And thereupon the court doth appoint T. A. Nathway, deputy sheriff, who in open court is duly sworn, to suffer no person to speak or communicate with the jury on any subject connected with the trial herein, or to do so himself, except the mere showing of the place to be viewed, which is to be done by Asa Richmond, one of the jurors, who being familiar with the locality, is appointed for that purpose."

The bill of exceptions states that during the taking of the testimony, and on the third day of the trial, when the order for the view of the premises was made, "Asa Richmond, one of the jurors, having stated that he was familiar with the premises, was appointed by the court to point out the place of the alleged murder, the localities surrounding it and the situation of the residence of the defendant, near which the body of deceased was found. And that that neither did defendant, his attorneys, nor the attorney for the state accompany the jury during their view. Neither did the judge who presided at the trial of the cause accompany the jury in their view, nor was there any other person (other than Asa Richmond, one of the jurors,) appointed by the court for the purpose of pointing out to the jury the place or places to be viewed by them."

The statute provides that "when, in the opinion of the court, it is necessary that the jury should view the place in which the offence is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which must be shown them by the judge or a person appointed by the court for that purpose." "Such officers must be sworn to suffer no person to speak or communicate with the jury on any subject connected with the trial, nor do so themselves, except the mere showing of the place to be viewed, and return them into court without unnecessary delay, or at some specified time." Gantt's Dig. sec. 1927–28. In the case of Patrick Hurley v. The State, there is a record entry made at the June term of this court, 1871, showing that the judgment was reversed and the cause remanded for a new trial because the defendant was not permitted to accompany the jury and be present when they viewed the place, &c., where the murder was charged to have been co m

mitted, &c. That, like this, was a case turning upon circumstantial evidence, and the record shows that the formalities required by law were all observed in making the view. In that case, as in this, the record is silent as to whether the prisoner asked permission to go with the jury, or was offered the privilege of doing so. The opinion in that case having been withdrawn by Mr. Justice Searle, then an incumbent of this bench, and not returned by him, has never been published or reported; but Mr. Justice Harrison, a member of this court, was then on the bench, and concurred in the opinion rendered.

Mr. Wharton says: "The visit (of the jury to the scene of the *res gestæ*) must be made in the presence of the accused, who is entitled to have all avidence received by the jury taken in his presence." 3 Wh. Cr. Law, 7th Ed., Sec. 3160, p. 151. See also State v. Berlin, 24 La. An. 46; Eastwood v. People, 3 Parker C. K. 25. By the bill of rights, the accused must be confronted with the witnesses against him, but the statute authorizing a view does not contemplate or permit the examination of witnesses at the view. The jury is merely to be conducted to and shown the place to be viewed, and the view is made to enable the jurors the better to understand the testimony given in court. But though no witnesses are examined at the view, yet the jurors, from their observation of the place and its surroundings, may receive a kind of evidence from mute things which cannot be brought into court to confront the accused, and are, in their nature, incapable of cross-examination.

But in prosecutions for felony "the defendant must be present during the trial. If he escape from custody after the trial has commenced, or if on bail, shall absent himself during the trial, the trial may either be stopped or progress to a verdict, at the discretion of the prosecuting attorney, but judgment shall not be rendered until the presence of the defendant is obtained." Gantt's Dig. Sec. 1887.

In Sneed v. State, 5 Ark. 433, the court, commenting on Sec. 154, ch. 55, Rev. Stat., then in force, which provided that no indictment for felony should be tried unless the defendant was personally present during the trial, said that the statute was declaratory and in affirmance of the common law, which would not allow any proceeding affecting life or liberty to be had in the absence of the prisoner, and when any step was to be taken in the cause, the prisoner was to be present personally, lest, in so important a matter, he should be prejudiced. This care of the law for his safety was extended through the whole trial, from his arraignment to his final conviction or acquittal." See also Cole v. State, 10 Ark. 518; Sweeden v. State, 19 Ark. 209.

The view of the place, where the crime is alleged to have been committed, by the jury, is part of the trial, and may be an important step in the trial, and the presence of the prisoner at the view, in a case involving life or liberty, that he may have an opportunity to observe the conduct of the jury and whatever occurs there, might be of the utmost consequence to him. The judge, who presides at the trial and hears the evidence, must determine whether or not a view be necessary, and if, in the exercise of his discretion, he deems it necessary to order the view to be made, it would be better and safer for him to accompany the jury, if convenient, to see that nothing improper occurs at the view. If not convenient, he may appoint a person to show the jury the place to be viewed, sworn as directed by the statute. If the jurors are familiar with the place, they may be conducted to it by a sworn bailiff in charge of them, and there could be no necessity for the appointment of another person to show them the place. The accused should be permitted to be present at the view, and, if not on bail, should be in charge of one or more sworn officers, to prevent escape. * * * Our opinion is that the motion for a new trial should have been sustained, because the appellant was not permitted to be present at the view. And for this error the judgment must be *reversed and the cause remanded* for a new trial.

Confirmation of Incomplete Titles to Land Ceded to the United States—Acts relating thereto.

MORRISON *ET AL.* v. JACKSON.

Supreme Court of the United States, October Term, 1875.

1. Spanish Land Title—Case in Judgment.—By the act of March 2nd, 1805 (2 Stat. at Large, 326), power was given to commissioners to decide summarily the rights of persons claiming incomplete titles to land in the territory ceded by France to the United States, subject to the determination of Congress. On April 12, 1814, another act (3 Stat. at Large, 171) was passed, confirming such claimants in certain cases, but expressly providing that no claim should be confirmed which should have been adjudged by the commissioners, or a register or receiver of public moneys, or a recorder acting as such, to be ante-dated or otherwise fraudulent; nor should any one be allowed a greater quantity of land than the number of acres contained in one league square, or a second grant. On April 29, 1816, Congress enacted that all claimes embraced in the report of the recorder of titles, acting as commissioner, dated February 2nd, 1816, where the decision of the commissioner was in favor of the claimant, should be confirmed. Under the act of 1805, one G. S. presented his claim to the commissioners, which claim was, on the 9th day of December, 1811, rejected by them. Subsequently, on the 7th of April, 1811, a survey was made, reported to the recorder of land titles, and on the 13th of September, 1825, a patent certificate was issued to G. S. or his legal representatives, and forwarded to the authorities at Washington for a patent. The patent was not issued, on account of a varience in the description, and because of a large quantity of lands being included in it not included in the survey. On the 11th of August, 1842 an act was passed directing a patent to issue to G. S., which was done, February 1, 1869. Pending the examination of the commissioner of the claim of G. S., the tract of land claimed by him was levied upon and sold under an execution and sheriff's deed, not acknowledged, as required by the laws then in force, given to one P. C., who afterwards conveyed the same to one Madam L., whose heirs, including said G. S. and wife, on the 29th of August, 1817, executed a deed to W. P. H., through and under which defendant in this suit claims, plaintiff making claim to the land in question through the heirs of G. S. The court below entered judgment for the defendant, which is affirmed on appeal.

2. ——. ——. The deed from the heirs of Madam L., including G. S. and wife, to W. P. H., is a confirmation by G. S. of the sale by the sheriff, and conveys both the tracts of land already confirmed and the interest of G. S., in land conceded by the former government, but not confirmed. The grantees of W. P. H. became the legal representatives of G. S., and acquired the title to all the land described in the patent of February 1, 1869.

3. Deed not properly Acknowledged—When Evidence.—A deed inoperative because not properly acknowledged may be read in evidence to explain subsequent conveyances referring thereto.

4. Ratification by Congress.—Although the power of the recorder to confirm titles was limited to those *not decided on* by the commissioners, and in this case the claim had been rejected by them, still Congress had the power to adopt and ratify an adjudication, though in excess of jurisdiction.

Error to the Circuit Court of the United States for the Eastern District of Missouri.

Mr. Justice CLIFFORD delivered the opinion of the court.

Claimants holding incomplete titles to land in the territory ceded by France to the United States, were required, by the act of the 2d of March, 1805, to deliver, before the day therein named, to the register of the land office or the recorder of land titles in the district where the land was situated, a notice in writing, stating the nature and extent of the claim, together with a plat of the same, and every grant, order of survey, and conveyance, or other written evidence of the claim, in order that the same might be recorded. 2 Stat. at Large, 326.

Prior to the passage of that act, the province ceded by the treaty had been subdivided and organized into two territories, and the fifth section of the act before referred to, made provision for the appointment of commissioners in each of the territories to ascertain and adjudicate the rights of persons claiming such incomplete titles. Power was conferred upon the commissioners to hear and decide, in a summary way, all matters respecting such claims, and the provision was that their adjudications should be laid before Congress and be subject to their determination.

Both parties in this case claim under the same original title, which is evidenced as follows:

1. By the petition of Gregoire Sarpy, addressed to the acting-governor, in which he asks for a concession of six-thousand arpents of land, to be taken from along the River des Peres, and in the woodland parts that belong to the domain of the king.

2. By the preliminary concession of the acting-governor, dated October 28, 1802, in which he concedes the land solicited, if it does not prejudice any person, and directs the local surveyor of the province to put the interested party in possession of the quantity of land which he asks in the indicated location. Direction is also givien to the surveyor, in the same instrument, that he should make a plan of the and conceded, and deposit the same at the military post, and furnish the party with a certificate which will serve to obtain the concession and the legal title from the intendant-general, to whom, by royal decree, belongs the granting of vacant land.

3. By the official survey made by the surveyor designated in the concession, which gives the courses, distances, corners, and monuments of the tract surveyed, supposed to contain four thousand and two arpents, together with a figurative plan of the same, showing that it was situated upon the River des Peres, about eight miles from St. Louis, the river being the eastern boundary of the tract.

4. On the 15th of April, 1804, another survey was made, under the same concession, by the same surveyor, in favor of Gregoire Sarpy, situated upon the river Meramec, in the woodlands of the king, about twenty miles southwest of St. Louis, and it appears that the surveyor returned a figurative plan of the tract, supposed to contain fourteen hundred arpents.

5. Supported by these evidences the claim for six thousand arpents was presented by Gregoire Sarpy to the board of comissioners, under the act of the 2nd of March, 1805, and the subsequent acts supplementary thereto, and the claim was, on the 9th of December, 1811, rejected by the said commissioners.

6. Pending the examination of the same before the board, the sheriff of the county, by virtue of an execution, levied upon and sold the four thousand and two "arpents of land on the River des Peres, being the same, more or less," and "being a part of the quantity of 6,000 arpents granted on the 28th of October, 1802, to said Sarpy," and it appears that on the 29th of June the sheriff made a deed of the same to Pierre Chouteau.

7. Pierre Chouteau and wife, by deed dated June 30, 1808, conveyed among other parcels of land to Madame Pelagie Chouteau, Widow Labadie, the four thousand and two arpents, just as the tract was acquired from the sheriff, situated on the River des Peres, and also "another land of 1,400 arpents," situated on the river Meramec, the two last lands forming a part of a concession of 6,000 arpents granted on the 28th of October, 1802, to the said Gregoire Sarpy by the acting-governor under the former government.

Among other things it is agreed by the parties, that Gregoire Sarpy died in the year 1824, leaving three sons as his heirs, to-wit, John B. Sarpy, Peter A. Sarpy and Thomas Sarpy, two of whom, to-wit' John and Peter, were living on the 11th of August, 1842, but that they all, before the 1st day of February, 1869, departed this life, each having by last will and testament devised his estate, real and personal, to Virginia, John R., and Adele S. Sarpy, the only children of John B. Sarpy at the time of his death, and being the nephew and nieces of Peter A. Sarpy at the time of his decease; that John R. Sarpy died single and without issue, subsequent to the death of his farther and uncle, having by last will and testament devised his entire estate to Virginia Berthold, since intermarried with Armand Penguet, and to Adele S. Morrison, wife of James L. D. Morrison; that Armand Penguet and Virginia S. Penguet con-

veyed all their interest and title in and to survey 1,953 to James L. D. Morrison before the present suit was commenced; that his wife, sometimes described in the record as Adele S. Morrison, is the granddaughter of Gregoire Sarpy and one of his three living heirs, and that the wife of Gregoire Sarpy departed this life before the commencement of the suit, and that Edward Abend is a trustee under a marriage settlement between the plaintiff and his wife, and that he claims no beneficial interest in the suit in his own right.

Certain portions of the premises, as more fully described in the record, to-wit, two undivided third parts of the same are claimed by the plaintiffs, and it appearing that the defendant was in possession of the same, the plaintiffs brought ejectment in the circuit court to try the title, and service being made, the defendant appeared and for answer to the petition filed a denial that the plaintiffs were entitled to the possession of the premises, and alleged that he and those under whom he claims and derives title have, for more than ten years prior to the commencement of the suit, been in the quiet, uninterrupted, and exclusive possession of the premises, adverse to the plaintiffs and all those under whom they derive their title.

Both parties appeared and waived a trial by jury and stipulated to submit the issues to the court. Many matters of fact were agreed between the parties, and certain others are embraced in a special finding of the court. Hearing was had, and the circuit court entered judgment for the defendant, and the plaintiffs sued out the present writ of error.

Sufficient appears in the agreed statement to show that Gregoire Sarpy is the same person to whom the concession was made by the acting-governor of the province under Spanish rule, and that the persons named in the agreed statement as the heirs of Madame Labadie, to wit, her son Sylvester and her four daughters, are the same parties who, together with their husbands, on the 28th of August, 1817, executed the deed to Wilson P. Hunt, through and under which the defendant makes claim to the land of which he is now possessed, as stated in his answer.

From the same source it also appears that Wilson P. Hunt died in 1843, that his wife was duly appointed administratrix of his estate, and that the property described in the deed was duly ordered to be sold as part of the estate of the decedent, and that it was so sold by the administratrix for the payment of the debts due from the estate of the deceased: and it is also agreed that the defendant has, for more than ten years next before the commencement of the suit, been in the quiet, uninterrupted and continuous possession of the premises, under claim of title thereto, adverse to all the world.

Due sale of the premises, it must be admitted, was made by the administratrix, and the record shows she conveyed the same to the grantor of the defendant, which, together with the deed to him from his grantor, completes the title, so far as respects the conveyances under which the defendant attempts to justify his possession.

Before the heirs of Madame Labadie, including Gregoire Sarpy and wife, conveyed the premises to Wilson P. Hunt, certain other proceedings took place in the office of the recorder of land titles, which it is important to notice.

Power to confirm incomplete titles derived from the former governments of the province, whether arising from grants, concessions, or warrants or orders of survey, was vested in the commissioners, appointed under the act before referred to, and the several supplements thereto, and it is matter of general knowledge that the larger portion of such claims was satisfactorily adjusted by virtue of those enactments. Others, however, remained when Congress, on the 12th of April, 1814, passed the act for the final adjustment of such incomplete titles. 3 Stat. at Large, 121.

By that act claimants of the kind were, in certain cases and under certain conditions, confirmed in their claims, but it was expressly provided that no claim shall be confirmed by the first section of the act which shall have been adjudged by either of the boards of commissioners, or a register or receiver of public moneys, or a recorder acting as such, to be *antedated or otherwise fraudulent;* nor was it allowed that any one should claim a greater quantity of land than the number of acres contained in one league square, nor could the claim of any person, in his own right, be allowed who had previously received, in his own right, a donation grant from the United States in said state or territory.

Pursuant to that act the recorder of land titles, on the 2nd of February, 1816, made his report to the commissioner of the general land office, inclosing four tabular lists, and the record shows that the claim in question was included in the third list, and that it was reported as confirmed for the quantity contained in a league square, which is seven thousand and fifty-six arpents. Comprised in the third list are confirmations of concessions, orders or warrants of survey, principally under the act of the 12th of April, 1814, and the claim in controversy is placed in the list, as follow: "Concessions," Ch. D. Delassus, Lt. Gov.; "survey," 18th March, 1803, and 2d January, 1804; "claimant," Gregoire Sarpy; "land claimed," 6,000 arpents; "situation," River des Peres. Opinion of the recorder, "confirmed, not exceeding a league square." 3 Am. State Papers, 337.

Official reports of claims not confirmed were required, under the act of the 3rd of March, 1809, to be made by the commissioners to the secretary of the treasury, and they were directed to arrange such reports into three classes: 1. Claims which, in the opinion of the commissioners, ought to be confirmed in conformity with existing laws. 2. Claims which, though not embraced within the provisions of existing laws, ought nevertheless, in the opinion of the commissioners, to be confirmed in conformity with the laws, usages and customs of the former sovereign. 3. Claims not embraced within the provisions of existing laws, and which, in the opinion of the commissioners, ought not to be confirmed. 2 Stat. at Large, 140.

Reports of the kind were made as required, and Congress, on the 29th of April, 1816, enacted that all claims embraced in the report of the recorder of land titles, acting as commissioner, dated the 2d of February, 1816, where the decision of the commissioner is in favor of the claimant, shall be and the same are hereby, confirmed. 3 Stat. at Large, 329.

All these proceedings took place before the heirs of Madame Labadie, including Gregoire Sarpy and wife, conveyed the whole tract of 7,056 arpents to Wilson P. Hunt, whose legal representative conveyed the same to the grantor of the defendant.

Attempt is made in argument to show that the words of the deed are not sufficient to convey the premises, but it is so manifest that the property is without merit, that it is unnecessary, in the judgment of the court, to pursue the argument, and the proposition is accordingly dismissed without further remark.

Subsequent proceedings also took place to secure the rights of the claimant, which deserve to be noticed. Enough appears to show that the surveyor of the United States for that territory, on the 7th of May, 1818, surveyed the 7,056 arpents on the River des Peres for Gregoire Sarpy, who claimed the same in his own right, and that the surveyor designated the survey thereof on the township plats as survey No. 1,943; and it appears that the survey made at that time embraced the whole of the original survey of 4,002 arpents reported by the surveyor of the former government.

Due report of that survey was made, and the recorder of land titles, on the 13th day of September, 1825, issued a patent certificate, No. 1,033, to Gregoire Sarpy, or his legal representatives, for 7,056 arpents, as contained in the said survey No. 1,953, and transmitted the same to the proper authorities here for a patent.

Evidence that the patent certificate was received here is convincing, as the commissioner of the general land office, under date of December 14, 1825, writes to the surveyor at St. Louis that it is received, and states that the recorder, under the provisions of the act of April 12, 1814, confirmed the claim "not exceeding a league square," and requests information as to the quantity of the land actually contained within the surveys, not exceeding a league square. Five days later he stated, in another communication, that the patent on the re-survey is withheld because it varies from the original survey and includes a large body of land confessedly not included in either of the original surveys.

Appeal was made to Congress for redress, and Congress, on the 11th of August, 1842, passed the act entitled an act for the relief of Gregoire Sarpy, or his legal representatives, which provides as follows: That it shall be the duty of the proper officers of the United States to issue a patent to Gregoire Sarpy, or his legal representatives, for seven thousand and fifty-six arpents, containing six thousand and two acres and fifty-hundredths of an acre of land, pursuant to patent certificate number one thousand and thirty-three, dated Sept. 13, 1825, and to the survey thereof numbered 1,953, certified by the said survey on the thirteenth of September, 1825.

Complete redress followed, as the patent, dated Feb. 1. 1869, was duly issued, reciting therein the act of Congress commanding the officers to issue it, the patent certificate and survey granting the land described in survey No. 1,953 to Gregoire Sarpy, or his legal representatives. For more than twenty years prior to the commencement of the suit the defendant had been in possession of the land described in the petition, having acquired it from Pierre Chouteau, who acquired it from the legal representatives of Wilson P. Hunt. But it is conceded by the defendant that the tract possessed by him was outside of the premises described in the deed of the sheriff to Chouteau, and outside of the survey of the 4,002 arpents, and that it was west of the portion of the concession so surveyed, and in the western part of the survey No. 1,953, for which the patented certificate was issued.

Material conclusions of law were also adopted by the circuit court, which are entitled to be considered in connection with the facts agreed and such as are embraced in the findings of the court. They are as follows:

1. That the deed of the sheriff to Pierre Chouteau, dated June 29, 1808, is inoperative as a conveyance, because it was not acknowledged as required by the laws then in force.

2. That the said deed is admissible in evidence as explanatory of the subsequent conveyances which expesly refer thereto.

3. That the deed from the heirs of Madame Labadie, including Gregoire Sarpy and wife, to Wilson P. Hunt, dated August 29, 1817, is a confirmation by said Sarpy of the sale by the sheriff in 1808 to Pierre Chouteau.

4. That the deed last mentioned conveyed to said Hunt all the tracts of land therein described which had been previously confirmed, and also the interest of said Sarpy in all other tracts of land described therein, to which the said Sarpy had a claim under concessions by the Spanish government.

5. That by virtue of said conveyance last mentioned the grantees under said Hunt to said land and claims, became the legal representatives of Gregoire Sarpy as to the premises in controversy, through survey No. 1,953, the patent certificate No. 1,033, the act of the 11th of August, 1842, and the patent dated Februrary 1, 1869, and that said legal representatives acquired the title to all the tracts of land described in the said patent.

6. That the title to the premises in dispute, thus acquired from the United States by said legal representatives, passed by operative and valid conveyances to the defendant, and that the plaintiff is not entitled to recover, and it appears that the circuit court rendered judgment for the defendant and for his costs.

Authority was vested in the recorder of land titles, by the act of the 13th of June, 1812, to perform the same duties in relation to such claims,

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not decided on by the commissioners, as were possessed and exercised by the boards constituted for the purpose under former laws, except that all of the decisions of the recorder were to be subject to the reversion of Congress. 2 Stat. at Large, 751.

Titles of the kind were, in numerous instances, adjudicated by the recorder, and many such claims were confirmed and patented. Doubt upon that subject can not be entertained, but his jurisdiction did not extend to claims *decided on* by the commissioners. 3 Am. State Papers, 337.

Beyond all doubt the claim in question was rejected, but the record furnishes no warrant for the suggestion that it was to be regarded as ante-dated or fraudulent. Instead of that, the clear inference is that the *bona fides* of the claim was not drawn in question, and the proof that the claim was actually confirmed by the recorder is full and satisfactory, and it is equally so that the claim as confirmed was reported to Congress.

Confirmations of the kind in excess of jurisdiction certainly were not in any sense obligatory upon Congress, but it can not be doubted but that power existed in the Congress to adopt and ratify such an adjudication, if for any reason the legislative branch of the government deemed it just and proper to make such a grant.

Documentary evidence of the most authentic character shows that the claim was confirmed by the recorder and that it was reported to Congress, and the better opinion is that it was confirmed by the second section of the act passed for the confirmation of such incomplete titles to lands in that territory, but the court here is not inclined to rest the decision entirely upon that ground. 3 Stat. at Large, 329.

Evidence to show that the claim was confirmed by the recorder, and that it was duly reported to the land office, is ample, and if more be needed it is found in two communications from the land commissioner, to which reference has already been made. He, the commissioner, there admits the confirmation, and the only excuse he offers for withholding the patents is that the survey is too large, and in consequence of that suggestion the claimant is subjected to further delay. Justice being denied by the executive officers, application was made to Congress for redress, and Congress, in view of the whole case, directed the proper officers of the United States to issue the patent to the original claimant, or his legal representatives, and we are all of the opinion that the defendant, to the extent specified in the patent, is the legal representatives of the original claimant, and that the judgment rendered by the circuit court is correct. JUDGMENT AFFIRMED.

McKee's Case—Opinion on Motion for New Trial.

THE UNITED STATES v. WILLIAM McKEE.

United States Circuit Court, Eastern District of Missouri, April 8, 1876.

Before Hon. JOHN F. DILLON, Circuit Judge, and Hon. SAMUEL TREAT, District Judge.

1. Criminal Procedure—Motion for New Trial—Oral Examination of Witnesses.—On a motion for a new trial in this case, one of the grounds was that a juror had, previous to the trial, uttered sentiments which showed a bias against the prisoner, whereas he had stated on his *voir dire* that he had not formed or expressed an opinion with reference to the defendant's guilt or innocence. To enable the court to pass upon this question, the court not only received affidavits, but required the principal witnesses to be examined orally before it.

2. ——. Bias of Juror—Judgment upon the Facts.—In this case it was shown by the testimony of a witness that some days before the trial, a person, who afterwards sat as a juror in the case, had said, "McKee has got his foot in it—is guilty—is the biggest toad in the puddle." The juror in question denied on oath that he made this statement. The juror had testified on his *voir dire* that he had not formed or expressed an opinion relative to the defendant's guilt or innocence. *Held*, on comparison of the testimony and of the supporting and rebutting affidavits and other testimony adduced, that it was not sufficient to overcome the statement of the witness made on his *voir dire*, and to show the juror to be disqualified.

3. ——. Misdirection of Jury—Criminal Evidence—Declaration of Co-conspirators.—The rulings upon this trial as to the testimony of Megrue, a conspirator, that he gave to Lancaster a co-conspirator, certain moneys to be paid to the defendant, and as to the effect of the subsequent declarations of Lancaster, that he did give the money to the defendant (*ante*, pp. 100, 97) reaffirmed.

4. ——. "Trial by Newspaper."—On Sunday morning, January 30, after all the testimony on this case had been heard by the court, a "leader" appeared in the Saint Louis *Republican*, evidently intended to be read by the jury, entitled "What the Jury will Read." This article exhibited a decided bias against the prisoner. Two copies of the paper which contained the article were purchased by members of the jury; but there was no proof that the article was read by any of them. The jury were under instructions which permitted them to read reports of the trial, but not editorial comments upon the case. *Held*, no ground for a new trial.

5. The court animadverted upon attempts of newspapers to influence the minds of jurors pending a trial.

Indictment for conspiring to defraud the government out of revenue on distilled spirits. Motion for new trial. The motion was heard in part on oral testimony as stated in the first paragraph of the head-note. The other facts sufficiently appear in the opinion of the court.

W. H. Hatch, Henry A. Clover and *Chester H. Krum*, for the motion; *David P. Dyer*, U. S. District Attorney, with whom were *James O. Broadhead* and *Lucien Eaton*, *contra*.

DILLON, Circuit Judge, delivered the opinion of the court orally, in substance saying:

In the case of the United States against William McKee, the indictment is under section 5440, of the R.S., which is in these words: "If two or more persons conspire together," that is, necessarily persons not occupying an official position, "to commit any offence against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of such conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than $1,000 and not more than $10,000, and to imprisonment for not more than two years." In the case under consideration, there was a trial extending through several days, resulting in a verdict of "guilty."

A motion is made by the defendant for a new trial upon three grounds. One of these grounds is for misconduct, or rather disqualification on the part of one of the jurors, viz: Mr. Hugh F. Summers. The second ground is the reception in evidence of certain declarations of Leavenworth made to Megrue. The third ground is misconduct—it comes under that general name—on the part of the jurors, in reading a certain article published on the Sunday after the arguments had been concluded, and prior to the charge of the court; that article being published in the *Missouri Republican*, and headed, "What the jurors will read."

I will briefly state the views which the court entertains after argument and consultation in respect to these three points; and first, as to the question whether Mr. Summers was a qualified juror. The disqualification is alleged to consist in the fact that before he went upon that jury panel he had formed, or, at all events, had expressed, an opinion relative to the guilt of the defendant, to the effect that he was guilty. If this is true, that is, if it were judicially established that that was so—it was admitted at the bar and undoubtedly is the law—it would be good ground for a new trial. There being no difference as to the law, the result depends on a question of fact. And how stands the proof in that regard? When this motion was made and the affidavits filed, stating that this declaration on the part of Mr. Summers had been made to one Foster, we said, knowing the advantage in investigating disputed questions, of having the witnesses before us, "If this question turns on the respective credibility of these two men—Mr. Summers, the juror, on the one hand, and Mr. Foster on the other—we must have them before us, so that they may be examined orally, and subject to cross-examination," and we have taken every means within our power, appreciating the magnitude of this case, and the interest which it involves to the government, and possibly the still greater interest which it involves to the defendant, of getting all the facts bearing on this question; we have subjected the statements of all these witnesses to repeated examinations and to severe scrutiny.

Mr. Foster stated in his affidavit that about eight days before the trial, at Lansdowne's store, or near there, he met Summers, and Summers stated in substance: "McKee has got his foot in it; is guilty; is the biggest toad in the puddle," and that he (Foster) made no reply to that. He also stated in his affidavit, and repeated the statement on the trial, that after the trial was over, he met Summers, and he names the place, and that thereupon, when they crossed over the street together, he remarked to Summers that they must have had jolly discussions, as they had been out eleven hours before they had agreed upon a verdict; to which Summers replied that he was very well posted, as he had taken pains to read up after he was summoned to serve on the jury. That is the substance of what Mr. Foster said, both in his affidavit and in his oral statement. Mr. Summers was summoned as a juror on the sixth day of January, requiring his presence here on the 20th. The officer who summoned him very prudently said to him, "You will avoid a good deal of embarrassment if you keep this thing to yourself." It was very well known to everybody that there was a great excitement concerning these trials, and he gave him very prudent advice, which Mr. Summer stated he observed. He also states that he did not even tell his partners that he was summoned on the jury till a very short time before he came here, so seduously did he follow that instruction.

Mr. Summers, when he was called into the jury-box, was sworn on his *voir dire*, and the question being put to him, he said he had formed or expressed no opinion concerning the guilt of Mr. McKee, but in his cross-examination admitted that he had had a conversation about it.

The way this matter has turned out, it is, perhaps, to be regretted that the counsel for the defendant did not pursue that a little more fully, but he pursued it as far as he chose.

Mr. Summers said he had had a conversation about this matter, but nevertheless he had formed or expressed no opinion as to the guilt of the defendant. When he made that statement, he was under oath, and it was a statement made under oath at a time when, so far as we can know, he had no motive, such as may possibly be ascribed to him afterwards, when he is attacked, to misstate the facts.

To serve on a jury is a duty that I suppose men in general would rather avoid than discharge, unless there is some latent, some undiscoverable motive. Most men—and perhaps, Mr. Summers—would have been very glad to have avoided that duty. If he did not, we do not know any reason why he should desire, for any sinister or improper purpose, to have served on that jury. So that, in determining this question of fact, we have the oath of Mr. Summers at the time when he was sworn, and when, so far as we know, there was no motive for him to misrepresent, that he had not formed or expressed an opinion concerning the guilt of the defendant; and on the examination, after his qualifications were attacked by the affidavit filed here by Mr. Foster, he states the same thing, and says: "I never had that conversation with Foster; it is not true." He denies it *in toto*, and denies the subsequent conversation which Mr. Foster imputes to him.

It is a plain, unqualified contradiction between these men in respect to these conversations. Now in determining where the truth lies, we

are forced to resort to other circumstances, and unfortunately these are by no means conclusive. Against Mr. Foster certain affidavits have been produced, the affidavits stating that his reputation for truth and veracity is not good, neither in the county where he now lives, nor in another county from which he came. Certain of these affiants who thus depose as to his character, are shown to have been connected with his family, and may be supposed to have had a family grudge or feud. We attach little or no importance to such evidence, but there are several affidavits of men, the sheriff and other men of character, who are not shown to have any personal pique or bias against Mr. Foster, who made a similar affidavit. On the other hand, Mr. Foster has brought in a large number of affidavits from the county where he now lives, and from that in which he formerly lived, from men of various occupations, and in various stations, to the effect that his character is good for truth and veracity; that is where that stands. There is no attack by any affidavit on the character of Mr. Summers for truth and veracity. Mr. Foster, when interrogated in regard to the details of these conversations, while he seemed to have a very distinct recollection that Mr. Summers used these words, he was not able to state how the conversation originated, how it came up, or what further was said. His mind seemed to rest on those words, and that was all he could recall concerning it. The occasion of the conversation, what else was stated in it, who, if anybody, else was present, he has not been able to recall; and the time in which he locates it seems to show that it is indefinite in his recollection or that he must be mistaken, in view of other circumstances. In his affidavit, he says that this conversation with Summers was about eight days before the trial. That would make it six days, or about that, after Summers was summoned. In his letter in which he communicated this to Mr. McKee, or the paper from which Mr. McKee got it, which was not read, but which counsel produced and showed to us, this time was stated to be several days before the trial, and in the conversation with Mr. Purse, the postmaster, he, Foster, located it at about two weeks before Summers went down to attend the trial. In his oral statements before the court, he said it was one or two weeks. Finally, on cross-examination, he really could not tell definitely whether it was before the 1st of January or afterwards, but he thought it was afterwards; so it stands in relation to the first conversation. In reference to the second conversation about having a jolly time at the discussion, and Summers saying that he had read up, that he had taken the pains to do so after he was summoned, and that he was well posted, which Mr. Foster imputes to Mr. Summers, Mr. Summers says is untrue: he says that he read nothing concerning this after he was summoned, and that, of course, when Foster says he admitted he had posted himself up, he must be mistaken about it, that it was not the fact, and he would not be likely to admit that it was a fact; and certain affidavits are relied on here as rather confirming Mr. Summers in that regard; for example, the affidavit of Mr. Pugh, the ex-sheriff of that county, who says that Foster, Summers and himself were there, and Foster came up, and it was asked "what all this meant?" and some one replied, in substance, "Why, here is Summers just back from the trials," and Foster, according to Pugh, then inquired, "What, has McKee been tried? I didn't know that the trial had taken place." That is Mr. Pugh's statement of what Foster said. Foster, on the stand as a witness here, contradicts that, and says; "I could not have said that, because I did know the trial was going on, and did know that it had taken place." Nevertheless, there is the statement of this witness that Mr. Foster did say this.

Now in looking over all this, we have been unable to discover one circumstance of moment which really corroborates Mr. Foster in the matter; so far as there are any corroborating circumstances, they are the other way. If you look at the character of the two men, without pronouncing any judgment on the matter, certainly the preference can not be given to Mr. Foster. That is enough to say. I attach very little importance to an affidavit to the effect that some man has the opinion of another that he is not a man of truth and veracity. I do not intend to reflect on Mr. Foster in anything. I may say—I simply say—in summing up this matter, it can not be said that in that respect Mr. Foster has any advantage of Mr. Summers; if there is any difference, looking at it in the light of these affidavits for what they are worth, it is the other way. Then the other circumstances, as to want of definiteness, as to how this conversation arose, what was the occasion of it, what further was said, want of certainty as to the time, or, if he locates it after this man was summoned, the improbability that he would disobey the injunction given to him and read this testimony, when he says he did not read it, the outside probabilities would rather be in favor of Mr. Summers; and, at best here is, after a trial, the oath of one man against the oath of the juror.

Now, in a trial attended with as much excitement as this one was, when there are so many chances for mistake and misunderstanding of what a man stated, and there is a deliberate verdict of the jury, we can not—and so the courts have frequently decided—set aside a verdict unless we are satisfied that the showing made against a juror's qualification, raises at least a presumption in favor of guilt; and this ground for a motion for a new trial, in our judgment, fails to show by a preponderance of evidence that that allegation against Mr. Summers is true in point of fact. Mr. Summers admits that he had a conversation at some time on the street with Mr. Foster. Mr. Foster might have imputed to Mr. Summers what some one else stated to him, and he might have misconstrued it. I am the last person in the world to impute any wilful wrong on the part of Mr. Foster; certainly his manner impressed me not unfavorably on the stand. He seemed to believe this, and I am satisfied in my own mind that he has not undertaken here to impose or perpetrate a wilful fraud by any means. His letter, in which he communicated this information, shows that he has a good deal of feeling on the subject, and perhaps it tends to show that a man, in time of excitement on a subject in which he seems to have felt a good deal of interest, might have formed and intensified an impression by perpetually thinking on the subject; and Mr. Foster seems to have thought a good deal about it. It is enough to say that the showing is not sufficient to overcome the oath of the juror that he entered the box without having formed any opinion.

In regard to the other ground, as to the charge of the court on the subject of the declarations of Leavenworth, I do not think it necessary to go at length into that. It was argued for several days; all the authorities were produced, and we took time to consider it. The opinion is in writing (*ante* 97,100) and, considering the arguments addressed to us, we see no reason to change that ruling. Several witnesses had testified as to the existence of this conspiracy between the distillers, Joyce and McDonald, and the revenue officers. Megrue testified that he was the collector for the ring, and that every week they made their collections, and every week they distributed the money; that he was the collector and distributor; that Leavenworth, a gauger, now deceased, was made use of by him to distribute the money; that he put it in packages; that one-fifth was set apart every week for the defendant, and that he gave it to Leavenworth, with directions to deliver this part to him. It was objected to at first that what Megrue said to Leavenworth at the time he gave him the money to deliver, could not be received in evidence for any purpose, but on the argument that was abandoned by defendant's counsel; but they did insist that Megrue could not testify as to subsequent declarations of Leavenworth to him as to whether he had delivered the money, and we admitted no other declarations—no other declarations of Leavenworth to anybody but Megrue, nor made at any other time—at least that was our ruling, and no exception was taken on the trial that the declaration offered to be produced in evidence was given at any other time; that those declarations were made at any other time than to Megrue, when he came back for the weekly amount. Now, then, we said: "We admit this as part of the *res gestæ* of the transaction of setting apart and receiving the money; it is necessary to explain why he went back." Megrue said week after week he delivered the money, and we said, This cannot be used by the jury as independent evidence, to convict Mr. McKee with fraud; that must be proved by other evidence; and we endeavored to make that very emphatic, and are surprised that in the way we limited it, counsel think there is any objection to it. We said in our charge:

"Leavenworth reported to Megrue, as the latter swears, when subsequently receiving packages, that he had distributed or delivered to McKee and Ford the packages previously received for them.

"But, as we instructed you on the trial, and now repeat, such declarations, that is, the declarations of Leavenworth to Megrue when he went back for money, from week to week; such declarations, while they are competent evidence to show the relations of Megrue and Leavenworth to each other and to the transaction, and to explain the act of receiving the money from week to week, they are not competent to establish the fact that the defendant McKee did receive the money; but such fact which, under the circumstances of this case, is equivalent to connecting him with the conspiracy, must be shown by evidence other than the mere declarations and statements of a confessed conspirator, not made to or in the presence of the defendant."

Now, then, suppose we had this case to try over again, and Mr. Megrue goes on the stand and testifies that he set apart those packages, and that he gave one of them to Mr. Leavenworth, with instructions to deliver it. Now, he comes back the week after for another package; is it not part of the transaction what he says, and did we not lay down the law as favorably for the defendant, no more favorably indeed, than he was entitled to, but as favorably as the principles of law would justify; that it was receivable only to explain that transaction, and we told the jury that that could not be received as any evidence to establish the fact that the defendant received it, so that they could not have mistaken their duty and were not, as we think, misled.

Some suggestion was made on the argument here, that certain declarations on the subsequent trial against Babcock were excluded, and certain declarations were excluded for the purpose for which they were offered. But the two cases bore no resemblance to each other; no witness testified, "I gave a certain amount to Joyce in money, set it apart, and directed him to pay it to Babcock." Aside from that, when that evidence was offered, we asked the district attorney, and the record will so show, "Do you offer these declarations for the *purpose of implicating the defendant?*" They said, "Yes." We said to them, as we said in this charge to the jury, "You can not implicate another by the declarations of a conspirator until the conspiracy is otherwise established," and refused to receive declarations of that sort. Then, again, in the case against Mr. McKee, there were several witnesses who testified directly to the conspiracy, and to the facts, from which the jury might infer the defendant's connection with it. There was no such evidence in the Babcock case; whether he was connected with it depended entirely upon telegrams, and to the credibility which would be given to the witnesses, Everest and McGill. In their legal aspect, the circumstances in which these two questions arose were not at all similar, and in looking over it, we both concluded the law was laid down in entire accord in both cases, though, for certain purposes, declarations were received in the one case, whereas under the circumstances and for the purposes for which they were offered, we held they could not be received in the other.

The third ground of the motion for a new trial is in respect to the newspaper article, and in the judgment of both of us, that was an improper article to be published when the jury was about to take the case under consideration, if it was intended it should be read by them The courts, before they were disabled by act of Congress, treated all articles, calculated to influence the result of a pending case, as contempts of their au-

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thority, and punished the writers of such articles accordingly. Now, that article can not be read without showing that there was a bias, at all events, against the defendant. That is undeniable, and if there is good reason to believe that that article had been read by the jury, and had influenced their verdict, if it was shown here conclusively that it had been read by them, we might be obliged, though we would be otherwise satisfied with the verdict, on legal principles, and following established precedents in this regard, to give the defendant a new trial. I make these remarks, because it ought to be understood that all attempts to influence the public mind, and particularly to influence jurors when they have a case, civil or criminal, before them, are improper; and, I think, when journalists, respectable journalists, understand this, they will act accordingly. But it is to be remembered in this case that we said to the jury, after having first prohibited the reading of papers: "You may read papers containing a report of this trial, but you must not read any editorial comments or articles criticising the trial one way or the other." It is in evidence that this article was published, but there is the affidavit of no juror or other person that it was ever read. Mr. Stevens, the bailiff, testifies that two copies of the paper were bought by the jury, but no witness stated that this article was ever read by a juror. Now, in view of the fact that we had cautioned the jury against reading such articles, and this article disclosed that it was an improper one by the very heading of it, shall we suppose that the jury disregarded their duty without any showing, or must we suppose that they did not? That is a matter that, if it were true, could have been shown by the affidavit of jurors, but there is no such affidavit; and on that ground we think that the motion for a new trial must fail, the same as the others.

Taxation of Mortgages.

THE PEOPLE v. HIBERNIA SAVINGS INSTITUTION.

Supreme Court of California, February 4, 1876.

Hon. WILLIAM T. WALLACE, Chief Justice.
" JOSEPH B. CROCKETT, }
" AUGUSTUS L. RHODES, } Judges.
" E. W. MCKINSTRY, }
" ADDISON C. NILES, }

Under the constitution of California which provides that "all property in this state shall be taxed according to its value to be ascertained as directed by law," mortgages can not be taxed. "Credits" are not property within the meaning of the constitution.

Opinion by MCKINSTRY, J.; NILES, J., concurring.

"Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value to be ascertained as directed by law; but assessors and collectors of town, county and state taxes, shall be elected by the qualified electors of the district, county or town in which the property taxed for state, county or town purposes is situated. Constitution of California, article XI., section 13.

There is no provision in the political code which requires, in terms, that debts secured by mortgage shall be taxed. That code requires that all property shall be taxed, and section 17 declares: "The words, 'personal property' include money, goods, chattels, *evidence of debt, and things in action.*"

Unless the provision of the constitution above quoted restrains or limits the power of the legislature, so as to prohibit the taxation of "evidences of debt and things in action," it is the duty of the assessors to assess not only mortgages, but all debts "solvent" or not solvent, and also all rights of action, whether arising *ex contractu* or *ex delicto*.

And this 1st, because it is the established law that *all* property must be taxed, and the legislature has no power to exempt any property; and, 2nd, because the legislature has declared that all property shall be taxed, and attempted to include in the definition of property all *choses in action*.

But to declare that it is the duty of the assessor to assess all "things in action," is to give a construction to the constitution which must lead to the greatest absurdities. The constitution in its application to the various departments of the government, and to individual rights, must receive such a construction as to give it a practical operation. There would be a contradiction in the single section of the constitution, if it were construed as requiring that *all* property should be taxed equally and uniformly with reference to its value, and that the word property includes all those things practically incapable of an appraisement bearing any definite relation or proportion to other things or property.

That choses in action are dependent on too many contingencies to be capable of appraisement which shall accord with any rule of equality or uniformity of value, is too plain for argument.

Yet the constitution requires that all property shall be assessed on the *ad valorem* principle by local assessors. All property which is visible and tangible is capable of such assessment; choses in action are not. The word "property" has been used in our language in several senses; but in the case in hand we can not be limited to the meaning given it by the code, but may also—and such is our duty—look for its meaning in the constitution. The constitution provides that no property, as property, shall be taxed except such as is capable of a valuation by the assessors, which shall be ratably equal and uniform with that affixed to all other property.

In Houghton v. Austin, 47 Cal. 661, it was held that taxation must be thus equal and uniform, and in People v. San Francisco Savings Union, 31 Cal. 138, that a valuation by an assessor is the very foundation of proceedings for apportioning and collecting a tax on property.

The 13th section of article XI. of the constitution requires that each article of property, capable of valuation, shall be fixed, or estimated, and the owner thereof made to pay a sum, which shall bear the same proportion to the whole amount levied, as does the particular property to the aggregate value of all the property in the state or tax district.

Under our constitution, therefore, the subject of taxation is the sum of all the values.

Independent of other constitutional restrictions, the state might take such portions of the wealth within its borders—the burden being distributed with uniformity—as the legislative department may deem necessary for the support or defence of the government. In this respect there would be no limitation, save that resulting from moral considerations, addressing themselves to the consciences of individual legislators. Supposing—what would thus be possible in theory—that the necessities of government required a tax of one hundred per cent. on all values, or, what would be the result of such a tax, an appropriation of all the property in the state—it is plain that the state would receive no benefit from evidences of debt due by some of her citizens to others, and payable out of the tangible property which the state has already taken.

It is property in possession or enjoyment, and not merely in right, which must ultimately pay every tax.

The legislature may declare that a cause of action shall be taxed, but a cause of action can not pay the tax, and this because it has, and can have no value independent of the tangible wealth, out of which it may be satisfied.

In a certain sense a promissory note, or any credit, is property. Whether "solvent," as the term is ordinarily employed, or not, it may be assessed for value; it would be difficult, however, to explain why a note discounted at twenty per cent. would be less appropriately called "property," than one sold at par. In any case, a credit has no value other than the value it has acquired by reason of the probability that the property having present actual value, *upon which a tax is levied and collected*, will be applied to the satisfaction of the claim it represents. He who has the property in possession must be taxed on its value, and the value once taxed can not be retaxed without a violation of the constitutional provision that each value shall be taxed proportionally to the sum of all the values.

The sovereign power of the people, in employing the prerogative of taxation, regards not the claims of individuals on individuals, but deals with the aggregate wealth of all; that which is supposed to be unlimited is here limited by an inexorable law which parliaments can not set aside, for it is only to the actual wealth that governments can resort, and that exhausted, they have no other property resource. This is as certain as that a paper promise to pay is not money.

It may not be possible in every case to show that the debtor has paid the tax assessed to his creditor. But it admits of mathematical demonstration—if the other property in the state has been assessed at its value—that the money which shall ultimately satisfy the debt—if it is ever satisfied—has paid its tax. If it were practicable to assess all the property in the state at the same moment of time, it would be clear to every mind that an assessment of a credit was an attempt to transfer to it a value elsewhere assessed. It may happen as the assessor goes his round that the same piece of tangible personal property is in fact twice taxed; but in every such case the presumption is that the first found in possession has parted with it for its value; that when the second person is assessed, the first has received other property of like value to that twice assessed; so that the uniformity required by the constitution is maintained in effect. But if a debtor is found to be the owner of one thousand dollars, and is assessed for that sum; and his creditor is found to be the owner of his note for $1,000, and is assessed for a like sum; and if, the day after the visit of the assessor to the creditor, the debtor shall pay his note, it is clear that the same value has been twice taxed; since the debtor has parted with his money, and received that which is certainly not taxable property in *his* hands, and which can never afterwards be assessed. When a debtor pays his debt, he does not abstract or destroy any portion of the taxable property of the state; the aggregate of value remains the same.

In People v. Eddy, 43 Cal. 336, decided at the April term, 1872, this court said: "The word 'property' is used in that section of the constitution in its ordinary and popular sense, and this is the general rule in the interpretation of constitutions and statutes, unless the context shows that the words are used in some technical or arbitrary sense." With this general proposition I fully agree, but I am not prepared to admit that in its vulgar sense, the word "property" includes *all choses in action*. And I feel compelled to dissent from the statement which follows, in the same opinion: "There is no good reason to believe that the word was used in that section, (section 13, article 11), in a sense materially differing from that which it has in other sections of that instrument." A single illustration will show that the foregoing is not literally correct. It has never been doubted in these arguments that gold and silver money is property which may be taxed. Such coins are more than promises to pay; they are composed of metals recognized as standards of value throughout the commercial world, and everywhere of purchasing capacity. But it has been repeatedly held that the clause of the constitution (art. 1, sec. 8)—"nor shall private *property* be taken for public use without just compensation," prohibits the taking of money. The reason is apparent. The compensation spoken of is money, and it would lead to an absurdity to say that money should be taken for the public, only in case an equal sum of money should be paid to the citizen when the money was taken. Such is the uncertainty of human language, that it is absolutely necessary to consider the *context* in order to determine the

sense in which a particular word is employed, if it can ever be employed in more than one.

The facts of the present case do not present any question as to the power of the legislature to require the payment of a specific sum by way of license for the transaction of a particular business, or the performance of particular acts.

The views above expressed remove the objection heretofore resorted to, that the creditor can not complain if the debtor shall pay a double tax. The creditor can always complain because the credit should not be taxed at all, inasmuch as it has no independent value, and, therefore, can not be taxed in proportion to such value—as part of the aggregate of value—in the manner required by the constitution.

And in the foregoing an effort has been made to abstain from any reference to the moral effects of a species of legislation which ordinarily transfers the burden of taxation from the lender to the borrower, and encourages misrepresentation and perjury by permitting the collection of a tax to depend upon the oath of the creditor, based on his *opinion* of the solvency of his debtors. The case should be decided by reference to the power of the legislature under the constitution.

I am of the opinion that "credits" are not "property" subject to taxation within the meaning of the section of the constitution above quoted.

Judgment reversed and cause remanded. Remittitur forthwith.

WALLACE, Ch. J., concurring.

The question in hand is whether "credits" are "property" in the sense in which the latter word is employed in the thirteenth section of the eleventh article of the constitution, which requires all "property" to be taxed in proportion to its value.

It is not to be doubted, of course, that even though credits be not property in the sense referred to, and consequently, not to be taxed *as property*, the legislature may, nevertheless, in its discretion, impose a tax upon such credits, as, for instance, it may require stamps of graduated denomination to be affixed to each promissory note or evidence of indebtedness executed, which form of tax, when put in operation, would probably enable everybody, certainly all borrowers, to realize the important truth, that a tax imposed upon credits, *in whatever form it may be imposed*, must always be paid, *not by the creditor, but by the debtor.*

Returning then to the question whether credits must be considered to be "property" in the sense adverted to, it will be remembered that the affirmative was maintained here in People v. Eddy, 43 Cal. 331. The question, however, involving, as it does, the correct construction of the text of the constitution itself, in respect to a matter of such great and constantly recurring importance as the working of the general revenue system of the state, is not, in my opinion, to be determined by reference to mere precedents, or to decisions already made.

Considerations, upon which the doctrine of *stare decisis* is supposed to be founded, certainly do not attach to a controversy of this character. A re-examination of the general question, wholly unembarrassed by what our predecessors or we ourselves may have said, if seen to have been ill-founded in law, does not involve either the possible disturbance of vested rights, or the overthrow of the rules of property supposed to have become fixed and settled.

I am of the opinion that credits are not property, in the sense in which the word *property* is used in the thirteenth section of the eleventh article of the constitution. That credits are correctly designated as "property," in a general sense, no one, of course, will deny; and that they fall within the true meaning of that word, as employed in other portions of the constitution, is readily conceded.

But as observed by Vattel, "It does not follow either logically or grammatically that because a word occurs in one section with a definite sense that therefore the same sense is to be adopted in every other section in which it occurs." Book 2, ch. 17, sec. 285.

It certainly requires neither discussion nor authority to show that in searching for the true sense in which a word has been used in a particular instance, it is proper, in fact often indispensable, to consider as well the subject-matter which it concerns, as the immediate connection in which it was used. Neither philology nor criticism, of themselves, afford safe rules for the interpretation of the language of statesmen used in establishing a system of finance, and providing for the fiscal necessities of the state.

The language found in the thirteenth section of the eleventh article of the constitution, referred to, is as follows: "Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value," etc.

This provision of the constitution established the cardinal rule that property taxation in this state should always be imposed upon an *an ad valorem*, as contradistinguished from a specific basis, and may be paraphrased thus: "All the actual wealth within this state shall be equally burdened with the support of the government." That *property*, as here employed in the constitution, and "*actual wealth*," as used in the paraphrase are synonymous, and that each of them alike excludes mere credits, is believed to be demonstrable. In the nature of things, both the scale of public expenditure indulged, and the consequent degree of taxation necessary for its supply, have reference to the actual aggregate wealth of the political community to which government looks for support. These habitually vary as the state is popularly said to be comparatively rich, or comparatively poor.

The legislature, in making up the budget, must necessarily, therefore, look to the aggregate amount of actual wealth in the hands of the people and borne upon the tax rolls. This constitutes the capacity to pay, which it is always indispensable for the statesman to consider. And in considering it, how, it may be asked, can it be supposed that the aggregate wealth of the people—their actual capacity to pay taxes—is at all made up of credits—the mere indebtedness owing by individual members of body politic to others of its members?

An answer would perhaps most readily be found in supposing, were such a thing possible, that the entire tax rolls exhibited nothing but such indebtedness. Taxation attempted under such circumstance would, of course, be wholly fanciful, as having no actual basis for its exercise.

It must, result therefore, that mere credits are a false quantity in ascertaining the sum of wealth which is subject to taxation as property, and that, in so far as that sum is attempted to be increased by the addition of those credits, property taxation, based thereon, is not only merely fanciful, but necessarily the unconstitutional imposition of an additional tax upon a portion of the property already once taxed. Thus, if there be within the state only one million and a half in actual material wealth, and if there be in addition a half million of credits, a tax of one per cent. imposed upon the two millions thus made up will prove to be in reality a double tax upon that portion of the one million and a half of actual wealth which is represented a second time as credits, from which double tax the remainder of the actual wealth, however, will escape altogether. To illustrate: let it be supposed that it is shown by the roll, that one million and a half of actual wealth is made up of one million in *goods* and one-half million in *money*, and that the *loan* of the half million in money has created the half million in *credits*. It will be seen that while the one million in goods are set down upon the rolls but once, the half million of money is set down twice for the purpose of taxation, once as money in the hands of the borrowers, again as money in the hands of the lenders—in the form of "credits"—that is to say, the promissory notes given by the borrowers. The goods, being represented but once, are taxed but once; the money, however, being represented twice upon the assessment roll, is twice taxed. This assuredly is not *the equal taxation of property* guaranteed by the constitution.

The taxation thus imposed nominally upon "credits" having resulted in the double taxation of the money, the additional tax must, of course, be paid by some one. And here all human experience, as well as the settled theories of finance, concur that it is not the lender who pays, but the borrower. The borrower is the consumer. The interest which he pays to the lender is the prime cost of the delay for which he has contracted. If the government, by the imposition of additional taxes, increase the cost, the borrower, being the consumer, must pay for it. The truth of this proposition is indeed so generally recognized that it is not unusual to insert in the instrument by which the repayment of the loan is secured, a distinct covenant upon the part of the borrower to refund to the lender all taxes which the latter may be compelled to pay by reason of the loan; and even where the covenant is omitted, the lender is doubtless fully protected at the expense of the borrower, by the exaction of an increased rate of interest upon the loan. To hold, therefore, that "credits" constitute "property" within the intent of the thirteenth section of the eleventh article of the constitution, would be to attribute a meaning to the word property as there used, which would not promote, but utterly defeat, the uniformity of property taxation in this state, which it was the principal purpose of that section to secure.

I, therefore, concur that the judgment of the court below be reversed.

CROCKETT, J., concurring.

I concur in the opinion of Mr. Justice McKinstry, and while it is not to be denied that the proposition that solvent debts are not "property" for the purposes of taxation within the intent of article XI., section 13, of the constitution, it is in conflict with several prior decisions of this court. I am satisfied upon more mature deliberation, and in the light of the latter and more exhaustive arguments of the questions, that the former rulings on this point can not be supported. The constitution being the fundamental law, it is of the utmost consequence to the people that its provisions should be properly construed. This is peculiarly true of those provisions relating to the power of taxation, a power more subject to abuse than any other, and which directly affects the interest of every citizen. Whatever weight may be due to the rule of *stare decisis*, as applied to other subjects, it ought not, in my opinion, to prevent a return to a proper construction of those provisions of the constitution which affect the vital question of taxation. No great property rights have grown up under the former construction, which can be injuriously affected by the change in the rule; and I discover no sufficient reason for persisting in a construction, the only effect of which, in a large majority of cases, is, to inflict upon the borrowers of money an unjust and oppressive system of double taxation. That this is the necessary result of a tax on debts secured by mortgage for money loaned, is, in my opinion, too plain to admit of debate. In the case of the Savings and Loan Society v. Austin, 46 Cal. 415, I have stated at length my reasons for that opinion, and it is unnecessary to repeat them here. I still adhere to that opinion; and in addition to the reasons stated by Mr. Justice McKinstry, why the tax involved in the present case should be set aside, I think that the facts disclosed by this record, present a clear case of double taxation of the same subject-matter; and the tax, having been paid by the mortgagors, can not again be collected from the mortgagee.

But while holding that solvent debts are not "property" in the sense of article XI., section 13, of the constitution, and therefore, are not required to be taxed on the *ad valorem* principle, it does not follow that the legislature is for that reason powerless to tax them in some other form. It exercises unquestioned the right to tax avocations, not because an avocation is property, but because the mode of taxation is unlimited, except in so far as they are restricted by the constitution; and article XI., section 13, prescribes the method only in respect to such subjects of taxation as are "property" in the sense of that clause. Solvent debts

XUM

not being "property" in that sense, can not be taxed as such under that provision, as was attempted to be done in the present case. But it might be competent for the legislature to require a stamp tax on a mortgage or a promissory note, for the same reason that it may tax the avocation of an auctioneer. In that event it would be a tax on the transaction of making the note or mortgage, and not a tax on the debt as property.

Mr. Justice RHODES dissents from the foregoing opinions, and from the judgment in this case, and will hereafter file an opinion.

Correspondence.

THE FEDERAL JUDICIARY—A REVIEWER REVIEWED.

EDITORS OF THE CENTRAL LAW JOURNAL:—Feeling an interest in having some radical changes in our federal judiciary system, for reasons assigned at length in a communication in the CENTRAL LAW JOURNAL, some seven months since, I beg to call attention to a few suggestions in answer to the selection from the criticism of Mr. McCrady, of the bill now before Congress, in last week's issue.

This is done the more readily, because there has been much unfriendly criticism of this bill, and you publish this one with a *quasi* endorsement, which of course lends force and sanction to it.

It cannot be claimed that the bill is free from defects, but at the same time it were better to leave some defects for correction by future legislation, than to press criticism so far as to defeat any action, on the part of Congress, as you yourself *tacitly* admit.

But to the extract. There are seven distinct grounds of criticism, which it is proposed to enumerate and examine briefly:

1. It is objected that, while the bill virtually abolishes the district court, it keeps up the name and the distinction, in some respects. This objection is easily answered. The act virtually confers circuit court powers upon the district court, with which Mr. M. does not find fault, and it leaves the district courts undisturbed, and thereby obviates the objection which would at once arise, upon any attempt to *abolish the courts*, and thereby disturb the tenures of the district judges. In short, the bill introduces a very sensible change in jurisdiction, abolishing appeals from district to circuit courts—a thing very proper in view of the new court of appeals—and yet leaves the names of the courts and the tenures of the judges undisturbed.

2. The purport of the second objection is, that more of the appellate jurisdiction of the supreme court is taken away than is contemplated by the constitution. If it be meant that the framers of the constitution did not contemplate such a curtailment of appellate jurisdiction, this is doubtless true, as they never contemplated such a marvelous change in a century. But after all, it is clearly within the power of Congress to do what they propose, and the question is one of practical expediency. Indeed it is scarcely pretended that there is any constitutional objection to the change.

3. The money valuation which limits an appeal is *too high*. This may be true, and, in the former article referred to above, I pressed upon the attention of Congress the necessity of some provision to extend the right of appeal to the lowest sum litigated, and I now concur in all the writer says as to the necessity of the right. But the mistake is in claiming that nothing else but an appeal to the supreme court in each case, will suffice. An attempt to provide for such a right would be simply impracticable. It would be vexatious to permit parties to be called to the Capital, to respond to appeals and writs of error in cases involving insignificant sums. If the right of appeal is provided elsewhere, it may well be curtailed here.

The writer of the article seems also to forget that the bill itself puts it within the power of the court of appeals to grant an appeal or writ of error, in proper cases, where the question justifies it, notwithstanding the sum involved is below the limit.

4. But it is said it were better, after the manner of the English system, to increase the number of judges, and classify the business, and permit any cause to be ordered before the whole court.

In answer to this, it may well be said that such a system is not adapted to our federal supreme court, which, with the increasing demands upon it, can only be looked to hereafter to settle great controversies, and to maintain uniformity of decisions, in the all-important questions arising under and more especially pertaining to the construction of the constitution, laws and treaties of the United States. The idea of increased numbers and division, is not in consonance with the highest ideal of our supreme court.

Besides, such a change would meet with hostility from the members of the present supreme bench, whereas the proposed change doubtless has their approbation, which might make all the difference between success and defeat of a measure for reform.

In the 5th, 6th and 7th propositions, respectively, it is objected that the several provisions of the act contemplate *nine* independent appellate courts, with the right to make rules independently of each other, and the want of any provision fixing the weight of authority, is urged. It is further objected, that the number of the judges will be too great. It is submitted that these objections are illogical and visionary. In the first place, the chief justice of each of the nine courts is a member of the supreme bench. Will not this of itself secure uniformity of rules? The rules which these tribunals are permitted to make, by the act, are rules for the conduct of their business. And the idea that this provision is in conflict with the act of 1872, is not to be entertained for a moment. As to uniformity of decision, it is matter of surprise that so much apprehension should be entertained. The supreme court would be the final arbiter, and the presence of a member of that court, in each of these courts, will have such a conservative influence as to preserve uniformity. The fear that the necessary cases will not reach the supreme court to settle all questions, is futile; the power of the appellate court to send a case up whenever it thinks fit, will obviate, most effectually, all such objections. Indeed it is suggested that the want-of-uniformity objection is greatly exaggerated, and hardly fairly presented. There are no better law reports in this country than the reports of decisions of the supreme judges on the circuit, and there is scarcely more discordance in them than may be found in the supreme court reports themselves.

The illustration from the bankruptcy reports is not a good one, not fair in any sense. In the first place, the law is a new one, and in many respects unlike any other. Many cases are discussed by counsel and decided by the court without precedent, and, at best, the decisions are but *nisi prius* decisions, and are furnished by the district judges, and sometimes by the registers, frequently to fill up law periodicals, sometimes to gratify the vanity of the writers, and sometimes to edify the profession. The result is, we have a great variety of them, many of them very able, some not so able, and some written without the examination or preparation necessary to justify the confidence of the profession, or to even approximate accuracy. But after all, the want of accuracy is greatly exaggerated by our critic. Any careful lawyer can take even these bankruptcy reports, and, very soon, if he have ordinary discrimination, determine what the law is, so far as he can ever learn this from reports.

But the proposition that it is safest to have *four* judges, so that if the judges divide equally the *first* ruling, shall stand, assumes too much, viz, that the opinion of the *nisi prius* judges is *prima facie* right, in cases appealed from. Whereas, all experience shows that more than two to one of cases taken to an appellate court with the intention in good faith to reverse them, *are reversed*. Indeed experience further proves that four judges are a very inconvenient and unsatisfactory number, as is well attested where it has been tried.

The whole objection to the numbers is without much merit. None of the courts will have actually present, a larger number than compose the supreme court, and no objection is made to numbers there.

There is still another objection which extensively prevails, and has much countenance from district judges, and has much more foundation than any yet considered. It is this: The circuit and district courts are over-crowded, and the judges are over-worked, and this new court will call them away. This may be so. But the answer is, If it shall prove so, Congress must provide the necessary judicial force to do the work, and if in practice, it shall become necessary to commit the work to separate judges, let it be done. The necessary legislation for additional judicial force *can not*, in these days of professed retrenchment, be had simultaneously with the passage of this bill, nor till experience proves their apprehensions well founded.

There must be some help, some step affording relief to the supreme court and providing, at the same time, appellate relief for citizens. This is the only measure which is now practicable. And I have no doubt that, with such modifications as experience shall suggest, the system will prove satisfactory. And I hope will not be defeated by over-cautious objections.

A. I.

[Referring to the above, we beg to say that we did not intend to commit ourselves wholly to Mr. McCrady's views. When we said that his objections were "well put and timely," we simply meant to convey the idea that we regarded them as well considered and able criticisms; and all such criticisms of a pending measure of such importance are "well put and timely." We are in favor of the passage of Mr. Knott's bill as it was first presented, and so expressed ourselves in our issue of February 11, (*ante*, p. 89), not hoping for anything better from a Congress which seems disposed to cut down salaries, already sufficiently low, for the purpose of manufacturing a little political buncombe, to be used in the coming presidental campaign. The House of Representatives has, for no better purpose, as we are convinced, and with the same scandalous and indecent haste which has characterized its action on some of the gravest matters, passed, by a large majority, a bill repealing the bankrupt law; whereas, we are convinced that the public interests demand the continued existence of the law, stripped, however, of some of the interpolations of 1874, which, however honestly intended, have made the law a cloak for the grossest frauds. We favor Mr. Knott's bill, although it nearly doubles the work of the circuit and district judges without increasing their compensation. As an illustration of what that work and compensation are, we may cite the fact that that able and upright judge, Hon. Samuel Treat, has been on the district and circuit benches at Saint Louis, holding court almost incessently for eighteen years at a salary of $3,500 a year, $2,000 less than is paid the judges of our state courts in Saint Louis. Judge Dillon, at a salary of $6,000 a year, pays his own expenses and lives a great part of the time in hotels and sleeping-cars, hurrying from place to place in six different states, not being able to sit longer than from one to three weeks in a place. To illustrate: He recently held a three weeks' term at Saint Louis, closing late Saturday evening, the 8th instant. On the following Monday morning he opened court at Little Rock and held it until Friday night, and on the next Monday morning opened court at Jefferson City, and will probably remain there a week, and then fly back to Saint Louis, or to some other point. We presume that to some of these overworked judges it is a matter of indifference, personally, whether the new court is created or not. They already do as much work as human nature can endure. Its creation will, however, in some degree increase the comforts of the Circuit Judge, since the appellate business of his various courts will, under it, be concentrated at one place, in a court over which he will, most of the time, preside. The creation of a strong appellate court in each of

the nine circuits will be a great and decisive step in advance of the present system, which, so far as appeals from the district to the circuit court are concerned, consists in the main, of one judge guessing against another. We say "a strong appellate court," for we take it for granted that the circuit and district judges sitting in banc in each circuit will compose such a court. We know that this will be the case in the seventh and eighth circuits. Of circuits at a greater distance from us, we can not speak with as much confidence.

We beg to say, in conclusion, that we concur in the main with the views so ably and judiciously put by the above correspondent.—ED. C. L. J.]

Notes of Recent Cases.

Fraud, where Agent of Vendor Acts as Confidential Adviser of Vendee.—The Supreme Court of Errors of Connecticut, in *Ballman v. Loomis*, (15 Am. L. Reg. N. S. 75), held that the policy of the law forbids that a person, acting as the friend and confidential adviser of a purchaser, should at the same time be secretly receiving compensation from the seller for effecting the sale; and that a contract for such compensation is void. Mrs. R called at the store of defendant to see pianos which he kept for sale. After selecting one, she decided not to purchase until she took the advice of plaintiff, a friend and expert. Plaintiff examined the piano, and in good faith advised her to buy it. But she did not purchase at once. Defendant meeting plaintiff, and knowing his relation to Mrs. R, gained plaintiff's consent to urge the sale upon Mrs. R, and at last succeeded. Then plaintiff demanded pay from defendant, which was refused; but afterwards defendant promised to give plaintiff twenty dollars. Upon these facts, the court below rendered judgment for plaintiff for twenty dollars. On appeal the court held as we have stated. We append the note to this case bearing the initials of the Hon. Isaac F. Redfield. "There is no principle of the law of contracts of more vital force than that which requires that the same party shall not be interested or act, either as principal or agent, upon both sides. It is but the adoption and enforcement of that fundamental rule of Christian ethics, 'ye cannot serve two masters.' The rule extends to a large number of those legal relations, resting upon confidence, trust and dependence upon one side, and advice, direction, superiority and control upon the other. Thus an agent will not be allowed to buy or sell for his principal, of any corporation or joint stock company in which the agent is interested, without acquainting his principal with all the facts known to himself, and allowing him to judge for himself, the principal being of full age and competent to act understandingly and prudently. Taylor v. Salmon, 4 Myl. & Cr. 139. So one cannot make a binding contract where he acts as the agent of both parties. N. Y. Central Ins. Co. v. Nat. Protection Ins. Co., 20 Barb. 470, where the cases are very extensively cited and judiciously analyzed by Mason, J. And in the very recent case of Raisin v. Clark, 41 Md. 158, the court held that a real estate broker, who was employed to sell a property, and effected an exchange for other real estate, could not charge the owner of the latter a commission. The law does not permit the broker in such case to act as agent of both parties, even by express agreement. Such an agreement would not be enforced; and a custom of brokers to receive a half commission from each party in an exchange, was held void as against a settled principle of law. So the trustee cannot become interested in the purchase of any portion of the trust estate. Parkhurst v. Alexander, 1 Johns. Ch. 394. And the purchase of any portion of the bankrupt estate by the assignee will be treated as a trust for the benefit of the creditors. *Ex parte* Lacey, 6 Ves. 625. And the same rule will extend to executors and administrators, and to all persons acting as trustees for sale. And the surety is not allowed to purchase the debt for his own benefit, but it will enure to the benefit of the principal debtor. Reed v. Norris, 2 Myl. & Cr. 374. So an agent who discovers a defect in the title to land of his principal cannot procure the title for himself. Ringo v. Binns, 10 Pet. (U. S.) 269. The principle of these cases is now universally recognized. It is very learnedly discussed by two eminent English chancellors, in the House of Lords, Thurlow and Loughborough, in the early and leading case of York Building Co. v. Mackenzie, 8 British Parl. Cases, in App.; 3 Paton 378. The rule extends to directors in joint stock corporations, so that they cannot legally derive any personal benefit from any of their transactions on behalf of the company. Great Luxembourg Ry. v. Magnay, 25 Beav. 586; 4 Jur. N. S. 839. A director cannot recover for work erected for the benefit of the company, if he was himself interested in the contract. Stears v. Southend Gas Light & Coke Co., 9 C. B. N. S. 180; 7 Jur. N. S. 447. The rule extends to the avoiding of all contracts procured by taking advantage of the relation of attorney and client. Corley v. Lord Stafford, 1 De Gex & Jones 238; Hobday v. Peters, 6 Jur. N. S. 794; 8 W. R. 512. The burden, in all cases between attorney and client, is upon the attorney to show that the transaction was entirely equal and fair. Lyddon v. Moss, 5 Jur. N. S. 635; Morgan v. Higgins, 1 Giff. 270. All securities between attorney and client are presumptively void. The burden rests upon the attorney to support them. Brown v. Bulkley, 1 McCarter 457. We need not here pursue this question further. The elementary books and the reports abound in wise rules and much beautiful moralizing upon them. The rule is even more stringent as between trustee and *cestui que trust*, than between attorney and client, where we have seen it is only required to show the transaction fair; but in the former case the same is equally void, at the election of *cestui que trust*, even where it appears that no advantage was taken. Cane v. Lord Allen, 2 Dow 289. Ld. Brougham, Chancellor, in Hunter v. Atkins, 3 Myl. & K. 113, puts the case of attorney and client upon the same ground, and we see no reason for any distinction in the cases. But, as we said, after much beautiful moralizing, we fear this very avenue to fraud and corruption is one that will be found, practically, most difficult to close up. Mere rules of law, or morality, seem to act as a kind of compensation in the minds of too many in our day, perhaps in all times, for giving more or less countenance to exceptional iniquities, upon the principle that all rules must and will have some exceptions, till the latter overbalance and outnumber the former."

Former Recovery—When a Bar.—The Supreme Court of Errors of Connecticut, in *Hungerford's Appeal from Probate*, (15 Am. L. Reg. 79), held that a former recovery, to become a bar, must be for the same *cause* of action, but not necessarily in the same *form* of action. The court say: "It is a well settled principle of law, that whenever a court of competent jurisdiction has judicially tried and determined a right or a fact, the judgment thereon, so long as it remains unreversed, shall be conclusive upon the parties and those in privity with them in law or estate. This trial and determination must be upon pleadings wherein is an averment of a fact precisely stated on one side, and traversed on the other, and found by the court or jury affirmatively, or negatively in direct terms, and not by way of inference. Such a result would be obtained where an issue is reached by special pleading; rarely, when the general counts in a declaration are met by a general denial. In our modern practice it is usual to insert several general counts in a declaration, and when the general issue is pleaded to these many different claims may be tried. When upon the pleadings thus framed a general judgment is rendered, and is thereafter pleaded in bar, it is *prima facie* evidence of a prior adjudication of every demand which might have been drawn into controversy under it; but, like other *prima facie* evidence, it may be met and controlled by other competent evidence tending to show that any particular demand or claim was not presented or considered. Sawyer v. Woodbury, 7 Gray, 499. In Kentucky v. Scovil, 14 Conn. 68, this court said, that 'in order to constitute a former judgment an estoppel, or, in other words, to render it conclusive on any matter, it is necessary that it should appear that the precise point was in issue and decided; and this should appear from the record itself.' And in Dickinson v. Hayes, 31 Conn. 423, the court say: 'Where two or more distinct causes of action are sued for in the same declaration, and there is a general verdict and judgment for the plaintiff, or a judgment for him on default, the record of such judgment is not conclusive evidence that both, or all, of those causes of action have been passed upon or adjudicated.'" The following is the note: "It seems to be well settled, as a general rule, that a former recovery for the same cause of action, is to be regarded as an equitable defence, and need not be specially pleaded under the old rule of pleading, requiring estoppels by record to be specially pleaded, under penalty of being regarded as waived by the party. Stafford v. Clark, 2 Bing. 277; Gray v. Pingry, 17 Verm. 419–423. A former recovery for the same cause of action is as much an equitable defence as payment or accord and satisfaction, and no more subject to any special stringency in pleading. And we may here state that by the same cause of action is not implied always that each particular of the items of the former recovery, and the present action, shall be precisely identical. As one entire cause of action can not be so subdivided as to maintain separate actions upon the different items, it follows that if the former judgment embraces any of the items in the present action, it will be a bar to the subsequent suit. Thus a conviction for a common assault will bar any future prosecution for the same assault, with intent to kill, or to commit rape. *Re* Thompson, 9 W. R. 203. This point was involved to some extent in the recent English case. Wemyes v. Hopkins, 23 W. R. 691; L. R. 10 Q. B. 378, where a prosecution under one statute was held to be a bar to another for the same offence, although in a different form and under a different statute. This view is decisive of the only question actually raised in the principal case. The dictum, that where the former adjudication is relied upon as an estoppel in regard to particular facts, it must appear by the record in the former action that such facts were in issue and directly passed upon, and the estoppel must be so pleaded, is well settled. Vooght v. Winch, 2 B. & Ald. 668; Outram v. Morewood, 3 East, 345; Hopkins v. Lee, 6 Wheaton, 109; Fairman v. Bacon, 8 Conn. 418; Gray v. Pingry, *supra*. It is said in some cases that where the question was, in fact, determined in the former action, but that does not appear upon the record, and where of course it can not be pleaded as an estoppel of record, it may nevertheless be given in evidence in any subsequent action between the same parties, where the same facts are involved, and will have such weight as the triers choose to give it. Vooght v. Winch, *supra;* Outram v. Morewood, Gray v. Pingry, *supra*. The precise effect of such a new finding, when acted upon in a subsequent action, seems not well settled. Our own views were expressed in the case last cited, and need not be repeated. And it is well settled that a judgment bond upon specific recitals upon the record will not, as matter of course, prove such recitals to the full extent, but only so far as is requisite to uphold the judgment. Burlen v. Shannon, 99 Mass. 200; Phil. Ev. ch. 2, § 2; Hotchkiss v. Nichols, 3 Day, 138; Coit v. Tracy, 8 Conn. 266; where it is said: 'Facts found by a former decree, which were not necessary to uphold the decree, do not conclude the parties.'" I. F. R.

—AMONG late congressional proceedings, we find that the bill, providing that Wilson McCandless, judge of the District Court of the Western District of Pennsylvania, may be retired on account of ill health, although he has not reached the age of 70 years, was taken up and amended so as to provide that he should resign at the end of six months after his retirement, and then passed.

Legal News and Notes.

—The *Law Times* says that Sir Henry Maine's work on Ancient Law has appeared in a Hungarian translation by the Professor of Jurisprudence at the University of Buda Pest. The translation is preceded by a brief description of the development of jurisprudence in England.

—The *Legal Intelligencer* of the 14th inst. containing the proceedings of the bar meeting held in Philadelphia, with the address of attorneys, and resolutions passed, on the occasion of the death of Theodore Cuyler, one of the oldest, ablest and most highly esteemed members of that bar. These indicate the high position which he occupied, as an attorney, and a good man, and we regret that our space confines us to this brief notice.

—Hon. Trusten Polk, Ex-Governor of Missouri, and Ex-United States Senator, died at his residence on Lucas Place in this city, on the morning of the 16th inst., at the age of 65 years. Gov. Polk was in full professional practice, having been engaged, during most of the part of two weeks, in the important suit of the Public Schools v. The Lindell-Baker Heirs, involving an old title to some city property, and which has been before the courts in different shapes for more than 20 years. We will give a more extended notice of his professional career in our next.

—Mr. Thurman's amendment to the bankrupt act, which passed the senate recently, provides that no voluntary assignment by a debtor, or debtors, of all his or their property, heretofore or hereafter made, in good faith, for the benefit of all his or their creditors, ratably and without creating any preference, and valid, according to the law of the state, where made, shall, of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors.

—A novel contention concerning the property in pianos hired upon the three-years-purchase system where the hirer becomes bankrupt, was successfully advanced in the court of bankruptcy on Thursday *In re Henkel*. The person letting the piano seized it, after the bankruptcy, on the ground that there had been default in paying an installment due after the act of bankruptcy. The trustee claimed it, and it was urged on his behalf that the contract of hiring was a contract within sec. 23 of the Bankruptcy Act, 1869, which the trustee was entitled to perform for the benefit of the estate. The trustee had tendered the installment, and Mr. Registrar Brougham took the view that the trustee was right, and without discussing the question of reputed ownership, directed the piano to be given up and the costs of the application to be paid to the trustee. —[*The Law Times*.

—At a time when Mr. Norwood's bill—proposing to make counsel liable in an action for the negligent discharge of professional duties—is still before the House of Commons, it may be well to consider shortly what is the position of this question in other countries. In America there is no monopoly, no barrier between the two branches of the legal profession. Lawyers may act as advocates when and where they like, and all lawyers can recover their fees, and are liable for professional negligence or gross professional ignorance. In France there are *avocats*, or barristers, and *avoues*, or solicitors. The conduct and discipline of the former, is regulated by a *batonnier* or president but they can not sue for their fees, which, however, are regulated by a fixed scale in all cases. The French *avocat* is not liable to an action for professional negligence, except in gross cases, and then not at the instance of a suitor. In Germany advocates can recover their fees according to a scale, and they are liable for professional negligence. In Italy the practice is much the same as it is in France. In Switzerland the practice is the same as in America.—[*The Law Times*.

—A Pleasant Way Out.—Mr. Grant (colored). Mornin, judge. I come on a circumstance I want you to delucidate.

Judge. Well, out with it.

Grant. Well, de whole circumstance ob de bisniss am dis. You see, judge, in slabery time, I had tree wife on tree plantation. Dey got along bery well togedder when day was apart, and I was well satisfaction, but since rebel times dese "devised statutes" fetch up all dese dern nonsense laws bout man and wife and I find I aint got no wife 'tall. I's no jection to dat, but jis here's whar de shoe pinch: jis here I wants your legal precision. De fac is, judge, I wants to jine de church. De boss leader say I can't come it onless I git marrid. Now, kin I, cordin to law, marrid all tree, or mus I marrid but one? Ef you say but one, and I 'tempt it, my 'spectable judge, you better b'leve dar will be de berry debbil ris on dat 'casion in dat church.

Judge. Mr. Grant, under the circumstances, I seriously advise you to rub out all old scores and begin afresh. Marry a new wife.

Grant. Dant's my han'! I goes in for you, judge, all de time. I tell you white folks is smart. Whar dey can't crawfish out, cullud folks no use to try.—[*The Charleston News Courier*.

—The *Nation* turns Mr. Pendleton over on account of the large fee which he took in a certain case, as shown in the recent investigations at Washington, and looks at him in this wise: "Being president of the Kentucky Central Railroad, and also administrator of an estate belonging to his sister and her two minor children, and the railroad having an old claim against the government for about $148,000, and the estate owning the greater portion of the stock of the road, he, as president, recovered the amount from the government, pocketed one-half for his own trouble, and gave the rest to his wards. It is curious to see how the transaction gets blacker the more we turn it over. As president of the road he was bound, if the claim was a good one, to recover it without fee or reward; if it was fraudulent, no money ought to have been sufficient to induce him to assert it. That it was fraudulent, was inferable from the fact that it had been preferred in Mr. Stanton's day and disallowed, which legally killed it. Its renewal, therefore, in Belknap's time, coupled with Mr. Pendleton's intimacy with Mrs. Belknap before her marriage, warrants the belief that Belknap had been discovered to be more pliable. But even if Mr. Pendleton, as president of the road, had been unscrupulous enough to obtain the money corruptly and illegally, it became his duty as administrator, when he got it, to hand it over to his wards. But this duty he also violated by appropriating to himself half the amount. So that there is absolutely nothing gained for him by walking round him and looking at him on all sides."

—The Winslow Case.—The delivery of Winslow to the Massachusetts authorities is delayed on account of some lack of definiteness in the terms of the extradition treaty existing between the two governments. The following interesting dispatch from London of the 5th of April explains the situation: "The *Times* this morning referring to the case of Mr. Winslow says, after two months from date of his committal, Mr. Winslow will be entitled to his discharge, unless the judge hold that events which have occurred constitute sufficient cause to the contrary within the meaning of the twelfth section of the extradition act. Whether Winslow is to be given up or not must depend upon whether the United States government will or can arrange to restrict the charges upon which he is tried, so as to satisfy the extradition act. We can have no wish to give shelter to an American criminal, but, of course, our law must be obeyed by our own executive, and strong grounds have to be shown before we should alter our law on a point where it has been solemnly recognized by many treaties. The truth is, our extradition treaty with the United States is very insufficient. Negotiations have long been going on for its improvement, and it is to be hoped the present complication will hasten them. Meanwhile it will be remembered all we ask is reciprocity; for already by our own act, we could not try an English forger surrendered by the United States except for extradition for the crime which might be proved by facts established by facts in America. It is a matter of wonder this question has not arisen before; but now it has been raised, our government would appear to have no discretion in the matter."

—In the realms of literature many a jewel is dropped by the wayside that, esteemed at the beginning for its value, is lost sight of in the hurrying changes that sweep over its broad bosom; in the neglected works of libraries, contributions lie under the gathering cobwebs, which, though small, with no ostentatious bindings or attractive titles,—mere pamphlet waifs,—are yet like gold prized for its fineness, or the diamond for its water. We pick them up by accident, and bless the happy chance that threw them in our way. Such, and so happened on, is a little pamphlet entitled "A discourse delivered by Hon. Samuel Treat, at the Inauguration of the St. Louis Law School, being the Law Department of Washington University, Oct. 16, 1867." It is a labor of love to rescue such a brochure from the obscurity into which it has fallen, and to express the hope that it may find the permanent place its richness and its excellence deserve. No member of the profession can read it without a feeling of intense pleasure, and a corresponding sense of great benefit. Whether in its portrayal of the broad and comprehensive sweep of law, as a system, and the grasp with which it enfolds the destinies of nations or individuals, in the noble aims it imparts to the character of its votaries, as well as in the matchless development which, by its training and study, it gives to the intellect; whether in the inculcation of the high duty it imposes, or the endless opportunities to aid the struggling and oppressed, afforded by its exercise; whether in the appositeness of its historical illustrations, the felicitous beauty of its classic, and poetic references, or the allusion to its distinguished representatives; whether in the searching analysis of the true principles that mark its organism, or the bland assimilation, to use the idea of Burke, by which it incorporates into the varied forms of life, the ideas which beautify and soften society—this little pamphlet is worthy not only of perusal, but of study. In these days, when complaint is made, and not without cause, that law has descended from the high plane where it formerly ranged, that the character of its votaries has been lowered, its aims have been turned away, and its nobler purposes degraded into unworthy channels, the reading of such a production would call back its deranged forces to the field of duty, as the trumpet call brings back the confused stragglers to the standard of right, which they have unwisely left, while even the best, and the truest, and ablest can drink from it fresh inspiration and find in it the food that will give renewed and still increasing strength. Though by no means its most striking, and noblest thoughts, we add the concluding sentences, as a conclusion to our brief notice: "If law be thus viewed, it will be recognized as the essential basis of all social organizations—as the custodian, preserver, and fostering parent of all human interests, furnishing the indispensable elements of social vitality. Those vital elements must be as all-pervading and free as the atmosphere we breathe. When we lie down, and when we rise up; during the silent watches of the night, while buried in unconscious and helpless slumber, as well as during the din and tumult of the day; in the weakness of infancy and strength of manhood; for feeble woman and infirm old age; in the bustle of the mart or workshop, and at the quiet fireside; in the remote cabin, lonely in its isolation from human haunts or buried in the depths of the wilderness, as well as in the thronged streets of crowded cities; whatever our age, sex or condition; wherever, situated and however shelterless and impoverished, careworn or weary, all around and about us, above and beneath, is the ever-present, life-giving, life-sustaining, though unseen, and it may be, unfelt, atmosphere of law. Its beneficent and preservative forces, when undisturbed, are as gentle in their influences as a summer's cloudless twilight or the falling dew; but if convulsed by passion and wrong, as terrible as the whirlwind or deluge."